TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 904

FOSTER CLINE, AS DISTRICT ATTORNEY FOR THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, APPELLANT,

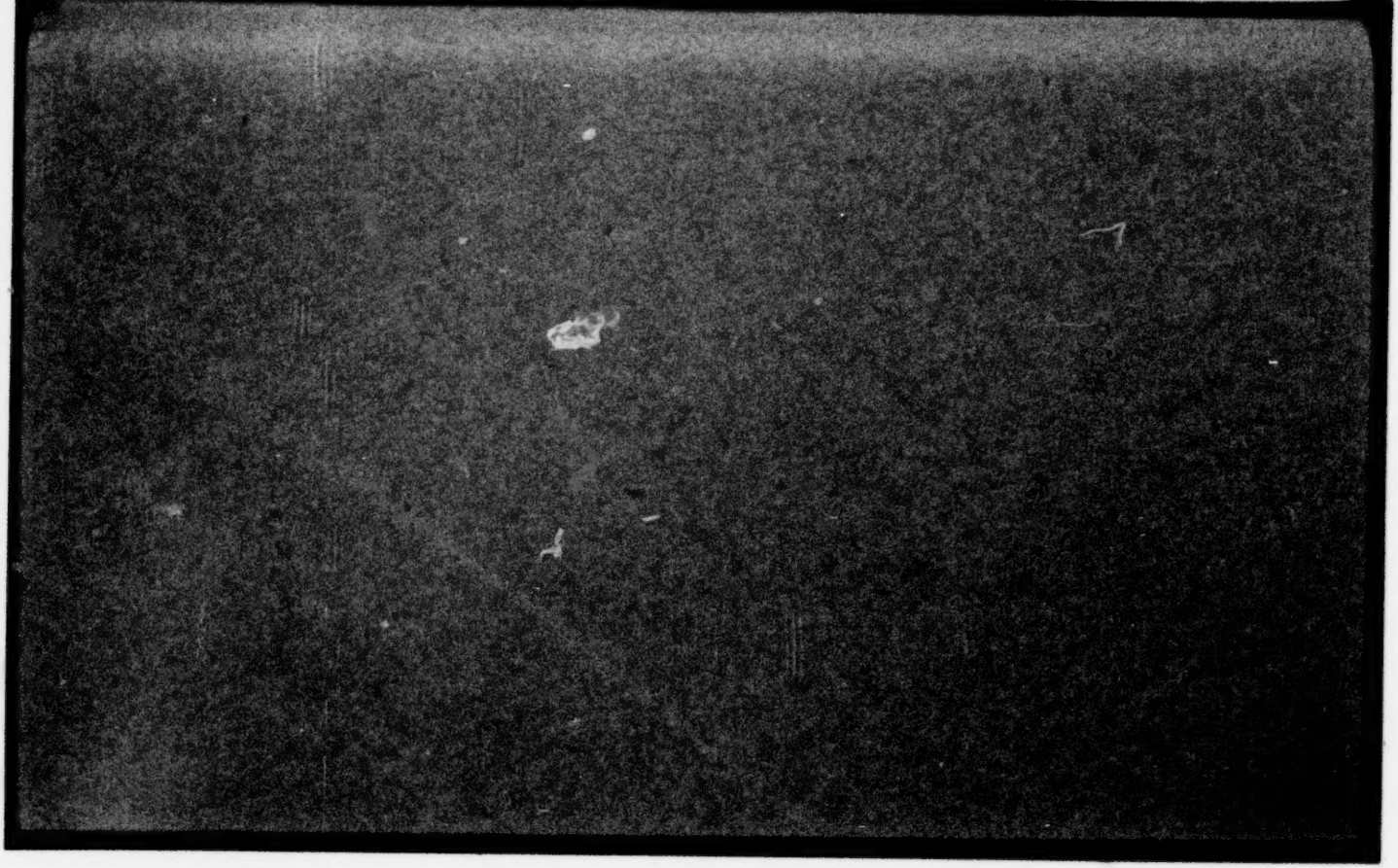
vs.

FRENK DAIRY COMPANY, THE WINDSOR FARM DAIRY COMPANY, THE CLIMAX DAIRY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

FILED FEBRUARY 21, 1927

(31,719)



(31,719)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 304

FOSTER CLINE, AS DISTRICT ATTORNEY FOR THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, APPELLANT,

vs.

FRINK DAIRY COMPANY, THE WINDSOR FARM DAIRY COMPANY, THE CLIMAX DAIRY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 28, 1926

[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

FRINK DAIRY COMPANY, a Corporation; THE WINDSOR FARM Dairy Company, a Corporation; The Climax Dairy Company, a Corporation; H. Brown Cannon, Clarence Frink, A. T. McClintock, and Morris Robinson, Plaintiffs,

vs.

FOSTER CLINE, as District Attorney for the City and County of Denver, State of Colorado, Defendant

BILL OF COMPLAINT—Filed October 29, 1925

Come now the plaintiffs above named, and for cause of action against the defendant, allege:

I

That the plaintiffs, Frink Dairy Company, The Windsor Farm Dairy Company and the Climax Dairy Company, are each and all corporations duly organized and existing under and by virtue of the laws of the State of Colorado; that said corporations and H. Brown Cannon, Clarence Frink, A. T. McClintock and Morris Robinson are each and all citizens and residents of the State of Colorado.

II

That the defendant, Foster Cline, is the duly elected, [fol. 3] qualified and acting District Attorney of the City and County of Denver, State of Colorado, and at all times with respect to which he is hereinafter mentioned was and is now, a resident and citizen of the City and County of Denver, State of Colorado.

III

That this suit is of a civil nature and in equity; that the matter or amount in controversy herein as affects each

of the plaintiffs separately and not jointly, exclusive of interest and costs, exceeds exclusive of interest and costs the sum or value of Three Thousand Dollars ($3,000); that said suit arises under the Constitution of the United States, in this: This suit necessarily involves and presents for decision the question of the validity under the Constitution of the United States of an Act of the Legislature of the State of Colorado, approved April 7, 1913, being Chapter 161 of the Session Laws of the State of Colorado for 1913, entitled—"An Act defining and prohibiting trusts; providing procedure to enforce the provisions of this Act, and penalties for violations of the provisions of this Act," said Act being commonly known and referred to as the "Colorado Anti-Trust Act;" that if said Act be enforced against the plaintiffs, or either of them, as it undoubtedly will be unless its enforcement is herein enjoined by this Honorable Court, such enforcement will necessarily and [fol. 4] certainly entail a loss and damage to each and every of the plaintiffs greatly in excess of the sum of Three Thousand Dollars ($3,000), exclusive of interest and costs, and would entail numerous prosecutions of the plaintiffs and each of them thereunder, causing a multiplicity of suits and prosecutions and a possible imposition upon the plaintiffs and each of them of penalties and fines greatly in excess of said sum, as is hereinafter more fully set forth.

IV

That plaintiffs, The Windsor Farm Dairy Company, Frink Dairy Company and The Climax Dairy Company each have been for a number of years, and now are, conducting large and varied businesses in the State of Colorado, dealing in and distributing milk, butter and all manner of milk products; that each of said named plaintiffs has invested in their respective businesses large sums of money in excess of the sum of One Hundred Thousand Dollars ($100,000) each; that their principal business is conducted in the City and County of Denver and surrounding territory. Plaintiffs likewise are engaged in interstate commerce, buying and selling from without the limits of the State of Colorado; that plaintiff H. Brown Cannon is a large stockholder of The Windsor Farm Dairy Company, owning stock therein of a value in excess of One Hundred

Thousand Dollars ($100,000), is the President of said corporation, and is actively engaged in and known as a dairy-
[fol. 5] man affiliated with that particular line of business; that plaintiff Clarence Frink is an officer of the Frink Dairy Company, owns stock therein of a value largely in excess of the sum of Ten Thousand Dollars ($10,000), and is actively engaged in the dairy business and is known and reputed in the community as an experienced dairyman; that plaintiff Morris Robinson is a large stockholder and an officer of The Climax Dairy Company, owning stock in value far in excess of the sum of Ten Thousand Dollars ($10,000), is actively engaged in the dairy business and is known and reputed in the community as an experienced dairyman; that plaintiff A. T. McClintock is an officer and stockholder of the Beatrice Creamery Company, owning and holding stock therein in value far in excess of the sum of Ten Thousand Dollars ($10,000), is an experienced dairyman by profession and known in the community as such.

V

That during the many years in which the plaintiffs and each of them have been doing business in the State of Colorado, they and each of them have by painstaking effort, fair dealing and careful management gained thousands of customers, a large and numerous individual patronage and developed a well established trade and in addition to their tangible property and assets herein mentioned they and each of them have developed, and now possess, a good will of great value, constituting one of their most valuable
[fol. 6] assets and to them and each of them of a value far in excess of the sum of Three Thousand Dollars ($3,000), separately and not collectively; that all of said property and good will may be lost to the plaintiffs and each of them, as hereinafter set forth, unless the plaintiffs and each of them be given the relief herein sought.

VI

That Chapter 161 of the Session Laws of the State of Colorado for 1913, provides as follows:

"Be it Enacted by the General Assembly of the State of Colorado:

Section 1. A trust is a combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or by any two or more of them, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

Second. To increase or reduce the price of merchandise produce or commodities.

Third. To prevent competition in the manufacture, making transportation, sale or purchase of merchandise, produce, ores, or commodities, or to prevent competition in aids of commerce.

Fourth. To fix any standard of figures, whereby the price to the public of any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State, shall, in any manner, be controlled or established.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind them [fol. 7] selves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and other so as to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity or by which they shall agree so to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected.

And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit

or to market at a reasonable profit those products which cannot otherwise be so marketed: provided further that it shall not be deemed to be unlawful or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or own any interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodities; and provided further that labor, whether skilled or unskilled, is not a commodity within the meaning of this act.

Section 2. It shall be lawful to enter into agreements or form associations or combinations, the purpose and effect of which shall be to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade.

Section 3. For the violation of any of the provisions of this act by any corporation, or by any of its officers or [fol. 8] agents mentioned herein, it shall be the duty of the attorney general of this State, or district attorney of any district in which said violation may occur, or either of them, upon his own motion to institute an action in any court in this State having jurisdiction thereof, for the forfeiture of the charter, rights and franchise of such corporation, and the dissolution of its existence.

Section 4. Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises or functions of a corporation in this state, violating any of the provisions of this Act, is hereby denied the right and prohibited from doing any business in this State, and it shall be the duty of the Attorney General to enforce this provision by bringing proper proceedings by injunction or otherwise.

Section 5. Each and every person, company or corporation, the officers, agents or representatives thereof, violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to a fine of not more than one thousand dollars, or to imprisonment for not more than six months; and it shall be the duty of the Attorney General of the State, or the district attorney of any district in the State, in which said

violation shall occur, or either of them, to prosecute and enforce the provisions of this act.

Section 6. Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of this State; and when any civil action shall be commenced in any court of this State it shall be lawful to plead in defense thereof that the cause of action sued upon grew out of a contract or agreement in violation of the provisions of this act.

Section 7. That any person, firm, company or corporation that may be damaged by any such agreement, trust or combination described in Section 1 of this act, may sue for and recover in any court of competent jurisdiction in this State, of any person, company or corporation operating [fol. 9] such trust or combination, such damages as may have been thereby sustained.

Section 8. In any proceeding pending in any court of record brought or prosecuted by the Attorney General, or any district attorney, for the violation of any of the provisions of this act, no person shall be excused from attending, testifying or producing books, papers, schedules, contracts, agreements or any other document, in obedience to the subpoena or under the order of such court, or any commissioner or referee appointed by said court to take testimony, or any notary public or other person or officer authorized by the laws of this state to take depositions when the orders made by such court, or judge thereof, included a witness whose deposition is being taken before such notary public or other officer, on the ground or for the reason that the testimony or evidence required of him may tend to criminate him or subject him to any penalty; but no individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, before any such court, person or officer."

That said Act at all times since its passage has been and is now, wholly void and ineffective, for the following reasons to wit:

(1) It violates Article XIV of the amendments to the Constitution of the United States of America in that said

Act deprives the plaintiffs of their liberty without due process of law; in that it is indefinite and uncertain and fails to fix any standard of criminality, and fails to define with reasonable certainty what combinations or agreements are unlawful, and leaves to speculation and surmise the deter- [fol. 10] mination of what profits are reasonable or unreasonable, and what agreements come within its prohibition, and for the further reason that said Act delegates legislative powers to a court or jury in the determination of what constitutes the offense and what combinations or agreements come within its provisions, so that no one at the time of the doing of the act or thing which forms the basis of the charge, can by any possibility determine whether or not he is violating said Act; and for the further reason that cruel and unusual penalties are to be and will be imposed upon the plaintiffs, who, acting without intent to do wrong, and with the honest intention and purpose to do right and to comply strictly with the requirements of said Act, will be subjected to the imposition of excessive fines and the possible forfeiture of right to do business in the State of Colorado, with the resultant loss of principal invested, established business and good will belonging to the plaintiffs.

(2) It violates Article XIV of the amendments to the Constitution of the United States of America in that said Act denies to plaintiffs the equal protection of the laws in that said Act exempts from its operation persons and corporations engaged in the business of selling or manufacturing commodities of a similar or like character, who employ, form, organize or own any interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodi- [fol. 11] ties; that said exemption is unjust, discriminatory and arbitrary, and deprives plaintiffs of their rights and property without due process of law.

(3) It violates Article XIV of the amendments of the Constitution of the United States of America, in that said Act denies to plaintiffs the equal protection of the laws in that said Act exempts labor from its operation, and that said exemption is unjust, discriminatory and arbitrary and deprives plaintiffs of their rights and property without due process of law.

(4) That said Act is in violation of Section 16 of Article II of the Constitution of the State of Colorado, popularly known as "Bill of Rights", in that it fails to define the nature and cause of the accusation *with* may be made thereunder, and fails to fix any standard of criminality, and fails to inform the plaintiffs, or anyone engaged in business, as to what combinations or agreements come within its prohibition.

(5) That said Act is in violation of Section 25 of Article II of the Constitution of the State of Colorado in that it deprives plaintiffs of their liberty and property without due process of law; in that it is indefinite and uncertain and fails to fix any standard of criminality, and fails to define with reasonable certainty what profits are reasonable or unreasonable, and what combinations are unlawful, and leaves to speculation, conjecture and surmise the determina-
[fol. 12] tion of what agreements or associations come within its prohibition; and for the further reason that said Act delegates legislative powers to a court or jury in the determination of what constitutes the offense and what combinations or agreements come within its prohibition; and for the further reason that cruel and unusual penalties are to be and will be imposed upon the plaintiff, who, acting without intent to do wrong, and with the honest effort to do right and to comply strictly with the requirements of said Act, will be subjected to the imposition of excessive fines and the possible forfeiture of right to do business in the State of Colorado, with the resultant loss of capital invested, established business and good will belonging to the plaintiffs.

(6) That said Act is in violation of Article III of the Constitution of the State of Colorado in that it unlawfully delegates to the judicial department of the government the powers properly belonging to the legislative department; that in and by said Act the legislative department has not itself established or defined what combinations or agreement are illegal or what profits are reasonable and has not set a standard or basis for the ascertainment of what is a reasonable profit, but attempted in said Act to delegate to the judicial department the right and power in each particular case and, by necessarily varying tests and standards,

the determination of whether a particular deed or trans-
[fol. 13] action comes within the prohibition of the Act.

VII

That the plaintiffs and each of them in carrying on their respective business of buying, selling and distributing milk in the City and County of Denver, and in order to intelligently conduct operations and to obtain accurate information as to the essential elements of the economics of the milk and its allied product distributing business, and in order to obtain wider and more scientific knowledge of the conditions affecting such business, it is necessary and desirable that plaintiffs and those so engaged should meet and exchange ideas, information and statistics, with reference to such business, local conditions and factors entering into the conduct of such business, and this for the mutual benefit of themselves and their patrons and customers. Plaintiffs and each of them believe, and so charge the fact to be, that such meetings and discussions would violate no valid law but is a right and privilege granted to them by the Constitution of the United States.

VIII

Plaintiffs allege that they dare not meet, either collectively or discuss with two or more parties similarly engaged, nor discuss with the farmers who are also the producers of milk, the things and matters hereinabove set forth for fear that at some subsequent time it will be contended that such conduct is in violation of the provisions
[fol. 14] of the Colorado Anti Trust Law hereinbefore set forth.

IX

Plaintiffs charge that in fact the defendant herein, Foster Cline, in his capacity as District Attorney for the City and County of Denver, State of Colorado, has been, and still is, claiming, asserting and charging that the plaintiffs and their competitors have been, and now are, acting in violation of said Anti Trust Act and have conspired and are conspiring to violate said Act. Deeming it his duty so to do under the provisions of said Act, he has caused an informa-

tion to be filed in the criminal division of the District Court of the City and County of Denver, in which the plaintiffs and the Beatrice Creamery Company, a Delaware corporation, are charged with a conspiracy to violate said Anti-Trust Act, said case being numbered 28320, Div. VI of said District Court, and being entitled "The People of the State of Colorado vs. H. Brown Cannon, The Windsor Farm Dairy Company, a corporation, Clarence Frink, Frink Dairy Company, a corporation, A. T. McClintock, Beatrice Creamery Company, a corporation, Morris Robinson, and the Climax Dairy Company, a corporation, defendants;" that the plaintiffs and each of them upon being arraigned pleaded not guilty thereto and said cause has been set for trial on November 9, 1925; that said defendant Cline will press the case to trial and has announced that he expects to try said case on said date unless enjoined by this Honorable Court.

[fol. 15]

X

That since said case was instituted, the Grand Jury has been, and now is, in session in the City and County of Denver, State of Colorado, and the defendant Cline has been, and now is, summoning various witnesses before said Grand Jury and questioning them about plaintiff's milk business; that said defendant has threatened, and unless restrained by this Honorable Court, will institute further prosecutions, file further informations and attempt to procure indictments of the plaintiffs by the Grand Jury for alleged violation of said Anti-Trust Act, and unless prevented, will press such prosecutions under said Act to final conclusion; that said activities of the defendant Cline constitute a constant threat and menace to the business of the plaintiffs, and that plaintiffs' reputation, good will and business are seriously injured and irreparably and immeasurably damaged by the publicity and resulting public odium which are necessarily attendant upon such activities.

XI

That the existence of said Anti-Trust Act upon the Statutes of the State of Colorado is a constant and continuing threat and menace to the business of plaintiffs and each of them, their property and property rights; that by the terms

of Section 3 thereof the duty is imposed upon the defendant in his capacity as such District Attorney to institute proceedings for the forfeiture of the charter, rights and fran-
[fol. 16] chises of such corporations and the dissolution of their existence, who have violated any of the terms of said Act; that plaintiffs herein are fearful and apprehensive that the defendant will, and he has threatened so to do, institute proceedings to forfeit the charters, rights and franchises and to dissolve the business of plaintiffs The Windsor Farm Dairy Company, Frink Dairy Company and the Climax Dairy Company.

XII

That plaintiffs, and other persons in similar business, cannot conduct the milk business without making investigations and gathering information from the public, from dairymen, and all available sources, as to the essential factors and elements entering into said business, and what its competitors are doing, for the reason that said business, which is highly competitive, requires scientific and accurate knowledge and information of all the economic problems entering into the production and distribution of milk; that by reason of the uncertainty of said Anti-Trust Law, plaintiffs dare not meet with or talk to their competitors or the producers of milk or discuss the problems of the industry without fear that someone else, viewing the matter at a later date, will reach the conclusion that they, no matter how conscientious they may have been in their efforts to comply with the law, have violated said Act and subject themselves to severe and unusual punishment.

[fol. 17]

XIII

That by reason of the facts as herein averred and set forth, the plaintiffs, nor either of them, have any plain, speedy or adequate remedy at law, and they and each of them, are wholly without remedy except the equitable remedy herein prayed.

Wherefore, plaintiffs pray:

First. That defendant be required to answer this bill, but not under oath, answering under oath being herein expressly waived.

Second. That a preliminary or interlocutory injunction be issued herein, to remain in full force and effect until a final hearing herein, prohibiting the defendant Cline, his agents, deputies and representatives, from enforcing or attempting to enforce against the plaintiffs, their officers or agents, said Anti Trust Act, and from taking any further steps in the prosecution of the trial of the plaintiffs, or either of them, in case No. 28320, Div. VI, in the District Court of the City and County of Denver, and from prosecuting or attempting to prosecute, institute or attempt to institute, any prosecution against the plaintiffs, or either of them, their officers or agents, under said Act, and from attempting to take any further steps with respect to the plaintiffs, their officers or agents, under and by virtue of any right or authority claimed to exist by reason of said Act, or any part thereof; and that, upon final hearing, said [fols. 18-21] injunction be made permanent.

Third. That this Honorable Court decree Chapter 161 of the Session Laws of the State of Colorado for 1913 to be wholly invalid, void and of no effect as against plaintiffs and all others similarly situated.

Fourth. That plaintiffs have their costs of suit, and such other and further relief as to the court may seem proper and fit.

Wilbur F. Denious, Hudson Moore, Simon J. Heller, R. D. Hawley, A. J. Fowler, Ernest B. Fowler, Attorneys for Plaintiffs.

Duly sworn to by H. Brown Cannon. Jurat omitted in printing.

[fol. 22] [File endorsement omitted]

In United States District Court

[Title omitted]

Motion to Dismiss—Filed November 2, 1925

Comes now Foster Cline, defendant in the above entitled cause, and moves the Court to dismiss the bill of complaint filed in this cause, for the reason that said bill of complaint

does not state any matter of equity entitling the plaintiffs [fol. 23] to the relief prayed for, nor are the facts as stated therein sufficient to entitle plaintiffs to any relief against this defendant.

Wherefore, defendant prays the judgment of this Court whether he shall further answer and that he shall be dismissed with his costs.

Foster Cline, District Attorney, Second Judicial District, State of Colorado, pro. se. A. L. Betke, Assistant District Attorney, Second Judicial District, State of Colorado; Paul M. Segal, Deputy District Attorney, Second Judicial District, State of Colorado; Harold Clark Thompson, Deputy District Attorney, Second Judicial District, State of Colorado; Wm. L. Boatright, Attorney General of the State of Colorado; Charles Roach, Deputy Attorney General of the State of Colorado; Jean S. Breitenstein, Assistant Attorney General of the State of Colorado, Solicitors for Defendant Above Named.

[fol. 24] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO BILL OF COMPLAINT — Filed November 4, 1925

Come now the above named plaintiffs and by leave of the Court first had and obtained amend their complaint in the following particulars, to wit:

First. By adding to the ninth paragraph of said complaint the following:

That said information embraces five counts and in each and every one of them the plaintiffs herein are charged with conspiring and unlawfully and injuriously devising [fol. 25] and designing and attempting to fix and control the price of milk and milk products in violation of the said "Anti Trust Statute." A copy of said information will unto this Honorable Court be exhibited.

Second. That the Honorable Charles C. Sackman, the Judge presiding in said District Court, City and County of Denver, has over-ruled and denied the unconstitutionality of said Statute and has refused to hear further arguments thereon, and has refused to give to defendants an opportunity of presenting the question as to the application of the "Marketing Act of 1923" of the Session Laws of the State of Colorado; that under said procedure plaintiffs are not permitted to appeal to the Supreme Court for a review of such decision until after the case has been heard and disposed of and tried to a jury; that to compel these plaintiffs to try the case to a jury upon its merits will entail upon them a vexatious burden; it will cause them to produce an exhibit in Court of all their private records and documents, trade methods, trade secrets, and methods of conducting business, the prices they are required to pay for products, the wages paid to their employees. Further, it will expose them to public ridicule, contempt, injure them in their good name, destroy the business, and alienate the customers that they have heretofore been able to serve with satisfaction, to the irremediable damage of the plaintiffs and each of them.

[fol. 26] Wherefore plaintiff prays that this amendment be allowed.

Wilbur F. Denious, Hudson Moore, R. D. Hawley, Fowler & Fowler, Simon J. Heller, Attys. for Plff.

Duly sworn to by H. Brown Cannon. Jurat omitted in printing.

[fol. 27] [File endorsement omitted]

In United States District Court

[Title omitted]

Amendment to Bill or Complaint—Filed November 4, 1925

Come now the plaintiffs in the above stated case and by leave of the Court first had and obtained, amend their bill of complaint as herein filed, and for cause of amendment allege:

1. By adding to the third section of paragraph VI, as found on page 9 of the complaint, the following:

And further because it violates Article XIV of the amendments of the Constitution of the United States of America in that said act denies to plaintiffs the equal pro- [fol. 28] tection of the laws in that said act as amended by Chapter 141 and Chapter 142 of the Session Laws of 1923 of the State of Colorado, and as construed by the Supreme Court of the State of Colorado, exempts persons engaged in the production of agricultural products and dealers in agricultural products from its provisions and that said exemption is unjust, discriminatory and arbitrary and deprives plaintiffs of their rights and property without due process of law.

2. By adding prayer number 5, as follows:

Fifth. That the defendant be enjoined and restrained from instituting any action and from taking any action whatsoever having for its purpose the forfeiture of the charter or charters, rights and franchises, of plaintiff corporations, herein.

Wilbur F. Denious, Hudson Moore, Fowler & Fowler, Simon J. Heller, R. D. Hawley, Attorneys for Plaintiffs.

Duly sworn to by H. Brown Cannon. Jurat omitted in printing.

[fol. 29] [File endorsement omitted]

In United States District Court

[Title omitted]

[fol. 30] Affidavit of Clarence Frink. Filed November 4, 1925

Before me, the undersigned, an officer authorized by law to administer oaths, personally appeared Clarence Frink, of lawful age, who, being first duly sworn upon oath, deposes and says:

I am one of the plaintiffs in the above entitled cause. I have resided in the State of Colorado for more than 30

years, and during all of that period have been engaged in the general dairy business, which said business is my principal business. I am Vice President and General Manager of the Plaintiff Frink Dairy Company, a corporation, and own stock in said corporation of an actual value in excess of Twenty Thousand Dollars ($20,000). Frink Dairy Company is a corporation organized and existing under and by virtue of the laws of the State of Colorado, and is actively engaged in buying, selling, treating, and manufacturing milk and milk products and distributing the same, and said Company has invested in the State of Colorado in plants, property, and equipment in excess of One Hundred and Twenty-five Thousand Dollars ($125,000).

Said Frink Dairy Company, by painstaking effort, fair dealing, and careful management has built up a substantial [fol. 31] business and has acquired thousands of customers and patrons, and its established business, trade, and good will has a value far in excess of the sum of Three Thousand Dollars ($3,000).

There is attached to the affidavit of H. Brown Cannon, filed in this case as "Exhibit A," a copy of "Information for Conspiracy to Violate the Anti Trust Law," which said exhibit is identical in form and in the same words and figures as a like copy of the same information served upon this affiant by the Clerk of the District Court in and for the City and County of Denver, in case No. 28320 pending in said Court, said "Exhibit A" is hereby made a part hereof by reference to the terms thereof; that in addition to said pending action, the above named defendant has stated that it is his purpose and intention to institute other prosecutions under the so-called Anti Trust Act of the State of Colorado and to take action to forfeit the charter of Frink Dairy Company.

That the business of Frink Dairy Company involves the sale of a large volume of milk and milk products in small lots at a small percentage of profit, and that said business brings the said company into contact with the residents of the City and County of Denver by supplying to said residents at their homes necessary foodstuffs and essential foods for children, and that because of such relationship it is essential that defendant Frink Dairy Company, if it is to be successful in this business, have and hold the good

will of its said customers and patrons which it for many years has enjoyed, and be held in high regard for its hon-
[fol. 32] esty and fair dealing by them; that such actions as the above mentioned case No. 28320, now pending in the District Court of the City and County of Denver and or actions threatened by defendant under the criminal statutes of Colorado above mentioned, whether successful or not, have had the effect, and will continue to have the effect, of destroying the good will of Frink Dairy Company, bringing it into disrepute, driving away its customers, greatly diminishing the amount of its business, and threatening its very life and existence, to the great damage of said Frink Dairy Company in the sum of many thousands of dollars and in excess of the sum of Three Thousand Dollars ($3,000) and causing irreparable damage and loss to it and its stockholders. That the aforementioned case No. 28320, pending in the District Court of the City and County of Denver has already caused the plaintiff Frink Dairy Company substantial damage and loss, in that since the institution of said action and during the month of September, 1925, the gross sales of said plaintiff Frink Dairy Company were in amount Six Thousand Eighty Nine Dollars and Thirty cents ($6,089.30) less than in the preceding month of August, 1925, and that the business of said plaintiff Frink Dairy Company was conducted during the month of September, 1925, at an actual loss of $2,500.76; that while the books of said plaintiff Frink Dairy Company have not been audited for the month of October, 1925, affiant believes and therefore alleges, that the business of said Company was conducted during said month at a loss
[fol. 33] fully as large, if not larger, than the loss sustained in the month of September, 1925; that the effect of said action upon the drivers and salesmen of plaintiff Frink Dairy Company has been to subject them to continual criticism and harrassment by their customers and the residents of the community, and, as a result, the efficiency of said employes has been greatly lessened, and they have been unable to render to their employer the full measure of service of which they would otherwise have been capable, and have been unable to secure new and additional business for said Frink Dairy Company or to hold and maintain the business which said Company had and enjoyed prior

to the institution of the aforesaid action, all of which has damaged said Frink Dairy Company in a sum greatly in excess of the sum of Three Thousand Dollars ($3,000) and will continue to damage said Frink Dairy Company in an amount considerably in excess of the sum of Three Thousand Dollars ($3,000) if said action and further contemplated actions be not enjoined by this court.

Affiant is a stockholder of said Frink Dairy Company, owning stock therein in excess of Twenty Thousand Dollars ($20,000); that the aforesaid action and contemplated threatened actions on the part of defendant herein have already lessened the value of said stock, and if said actions are continued their effect will be to lessen and eventually to destroy the value of said stock, and whether [fol. 34] said prosecutions are successful or unsuccessful, if continued, they will in that respect damage this deponent in the sum of more than Twenty Thousand Dollars ($20,000) and considerably more than the sum of Three Thousand Dollars ($3,000).

Deponent by said actions, instituted and threatened, has been held up to contempt and ridicule, and by the continuation of said prosecutions and the institution of other actions threatened and contemplated by the defendant, will continue to be brought into contempt and ridicule before the public and his good name and reputation injured and destroyed. In this respect unless the defendant is enjoined from other actions under color of the statute of the State of Colorado commonly known as the Anti-Trust Act, Deponent's character will be besmirched, his reputation and good name destroyed and he will be damaged in a sum in excess of Twenty Five Thousand Dollars ($25,000), or other large sums, for all of which said damage deponent herein will be without remedy of recourse and said damage irreparable.

Deponent herein is an experienced dairyman and is the active managing officer in the employ of said Frink Dairy Company. His services as such officer and employee are worth to said corporation, and said corporation is paying to deponent for said services, the sum of Three Thousand Six Hundred ($3,600) per year. Said business in which deponent is engaged is one of the common occupations of life.

[fol. 35] That in view of the provisions of the so-called Anti-Trust Act of the State of Colorado, as set forth in the Bill of Complaint herein, deponent is unable to pursue his business and calling in a free and unhampered manner; he is unable to render to his employer the full measure of service which he would be able to render in the absence of said statute. He dare not confer or converse with competitors and or the producers of milk with reference to the economics, statistics, and other essential matters entering into the economic conduct of the dairy and milk business. He is unable to determine, and his counsel are unable to inform him, just what he may or may not do in pursuit of his calling and business without violating the terms of said Anti Trust Statute. That if said statute is held to be a valid and enforceable law, this deponent can not in the future follow his calling and business in a free and unhampered manner. He will not be able to render to his employer the full measure of service to which it is entitled and which it otherwise would receive in the absence of the provisions of said statute. That the services which he can, and will, be able to render to said employer in the absence of said statute will be worth many thousands of dollars per year to his said employer more than the services which he is able to render in view of the provisions of said statute. That in view of the terms of said statute, Frink Dairy Company will not, and will not be able, to pay this [fol. 36] deponent for future services anything approaching the amount which deponent now receives, and that if said statute is to remain in force and effect deponent's earning capacity will be decreased thereby in a sum not less than Three Thousand Dollars ($3,000) per annum, to the irreparable injury and damage of this deponent, and deponent will have no redress therefor.

Further deponent saith not.

Clarence Frink.

Subscribed and sworn to before me this 2nd day of November, A. D. 1925. Hazel M. Costello, Notary Public, commissioned and qualified to act in and for the city and county of Denver, State of Colorado. My commission expires February 14, 1927. (Notarial Seal.)

[File endorsement omitted]

In United States District Court

[fol. 37] [Title omitted]

Affidavit of Simon J. Heller—Filed November 4, 1925

United States of America,
State of Colorado,
City and County of Denver, ss:

Simon J. Heller, being first duly sworn on oath, deposes and says: That he is the attorney for The Climax Dairy Company a corporation and Morris Robinson, parties plaintiff in the above entitled cause and also attorney for the said The Climax Dairy Company and Morris Robinson, defendants, in case No. 28520, wherein The People of the State of Colorado is plaintiff and the said Morris Robinson and The Climax Dairy Company, among others, are defendants which suit is pending before the Hon. Charles C. Sackman, one of the Judges of the District Court of the City and County of Denver, State of Colorado, sitting in Division VI thereof; that on the 23rd day of October, 1925, affiant became aware of certain decisions whereby he was of the opinion that the so called Anti-Trust Law of Colorado as contained in Chapter 161 of the Session Laws of 1913 of said State, was unconstitutional; that affiant's opinion that the same was unconstitutional was based primarily upon the decision of the Supreme Court of the United States in the case of United States vs. L. Cohen [fol. 38] Grocery Company, 255 U. S. 81; that thereupon and on said date, affiant called on the Hon. Charles C. Sackman in his Chambers in Division VI of the District Court of the City and County of Denver; that affiant informed Judge Sackman that since the hearing of the Motion to Quash the Information in the case pending before him, the decision of the United States Supreme Court as aforesaid had been called to affiant's attention, and affiant was of the opinion that the Anti-Trust Act was unconstitutional; affiant requested Judge Sackman to grant leave to affiant's clients and the other defendants to present further argument why the Order theretofore entered overruling the Motion to Quash, should be vacated and a further hearing

had, and the Motion sustained; or that leave be granted to file a second and further Motion to Quash urging as the ground therefor the fact that the said Anti-Trust Act is unconstitutional and that the clients of the affiant as well as the other defendants in the suit pending before the said Judge Sackman should not be required to stand trial under an Information based on an unconstitutional act; the affiant thereupon submitted to the said Judge Sackman the decision of the Supreme Court of the United States in the above mentioned case; that Judge Sackman stated to affiant that he would read the case, consider the matter, and advise affiant the following Monday whether he would grant affiant's request; that Judge Sackman expressed himself as being unwilling to take the responsibility of de- [fol. 39] claring the act unconstitutional; that during the same conversation affiant informed Judge Sackman that it was the intention of the affiant, as well as of the other attorneys representing the other defendants in the case pending in Judge Sackman's Court, to file a Bill of Complaint in Equity against Foster Cline as District Attorney, to enjoin the further prosecution of the said case, if the said Judge Sackman should refuse to hear the matter further; that thereupon the said Judge Sackman stated that it would please him if the Federal Court would take jurisdiction and decide the issue as to the constitutionality of the said Anti-Trust Act; that thereupon affiant left Judge Sackman with the understanding that Judge Sackman would give a final expression of his views the following Monday.

That thereafter and on to wit, the 26th day of October, 1925 affiant called Judge Sackman on the telephone to obtain his views and expression relating to the conversation had by affiant with Judge Sackman on the 23rd day of October, 1925; that Judge Sackman informed affiant that he did not care to grant affiant leave to reopen the hearing on the Motion to Quash or file another Motion to Quash nor to hear further argument thereon, and that he would rather that the Federal Court decide the question; that immediately after receiving said statement and expression from said Judge Sackman as aforesaid, this affiant advised [fol. 40] the attorneys for the other plaintiffs herein as well as the attorneys for the Beatrice Creamery Company that Judge Sackman had expressed himself as aforesaid; and

thereupon and thereafter the Bill in Equity was filed by the Beatrice Creamery Company and the Bill herein filed by the plaintiffs herein.

Simon J. Heller.

Subscribed and sworn to before me this 3rd day of November, A. D. 1925. My commission expires ——, ——. My Commission expires October 30, 1927. Noah Atler, Notary Public. (Notarial Seal.)

[File endorsement omitted]

In United States District Court

[fol. 41] [Title omitted]

Affidavit of A. T. McClintock—Filed November 4, 1925

Before me, the undersigned, an officer authorized by law to administer oaths, personally appeared A. T. McClintock, of lawful age, who, being first duly sworn upon oath, deposes and says:

That I am one of the plaintiffs in the above entitled case; that I have resided in the City and County of Denver, State of Colorado, for fifteen years; that I have been the manager of Beatrice Creamery Company for the State of Colorado for fifteen years, and have during all of that time been actively engaged in the creamery business, the buying and selling of milk and milk products, and have by virtue of said business and experience, become an experienced dairyman; that I am also the Vice President and Manager for Colorado for Beatrice Creamery Company, a corporation, plaintiff in case No. 7986 in this court; that I own stock [fol. 42] of said Beatrice Creamery Company of an actual market value in excess of $30,000; that Beatrice Creamery Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is authorized to do business in the State of Colorado by virtue of full compliance with the laws of the State of Colorado.

That said company is actively engaged in the production and distribution of milk and milk products, and is now,

and has been for many years, conducting a large and varied business in the State of Colorado, consisting of the manufacture, sale and distribution of ice, the furnishing of cold storage, the manufacture of butter, and the distribution of milk and milk products, including buttermilk and buttermilk powder, sweet cream, and has invested in the State of Colorado, in plant, property and equipment, more than $200,000.00.

That by painstaking effort and careful management, said Beatrice Creamery Company has gained thousands of customers and developed a well established trade, and has developed and now possesses a good will worth many thousands of dollars in value, far in excess of the sum of $3,000.00.

That deponent and Beatrice Creamery Company are defendants in the case of The People vs. H. Brown Cannon, et al., being No. 28320 pending in the District Court of the City and County of Denver, State of Colorado.

That in addition to said pending action, defendant in this [fol. 43] above entitled case has stated that, as District Attorney, it is his purpose and intention to institute other proceedings and prosecutions and to take action to forfeit the charter of Beatrice Creamery Company; that such actions taken, and or threatened, whether successful or not, have had the effect, and will continue to have the effect of destroying the good will of Beatrice Creamery Company and deponent, bringing Beatrice Creamery Company and deponent into disrepute driving away customers, and threatening the very life and existence of Beatrice Creamery Company, and causing irreparable and immeasureable damage to Beatrice Creamery Company and its stockholders.

That deponent is employed upon a salary in excess of $3,000.00 by Beatrice Creamery Company, and also receives from Beatrice Creamery Company a percentage of the net profits earned in the State of Colorado by said Beatrice Creamery Company; that the said action of defendant in instituting and urging said case to trial, and in threatening further and additional contemplated actions in the future has already greatly lessened the value of the good will of Beatrice Creamery Company; and has injured and lessened the value of the stock of plaintiff in Beatrice

Creamery Company, and has directly affected the earnings which deponent will receive for his services as Manager of Beatrice Creamery Company in the State of Colorado, and if said Acts are continued by defendant as District Attorney, the value of said stock of Beatrice [fol. 44] Creamery Company, and of the stock held by deponent, will be further depreciated.

Deponent says that the actions of defendant as District Attorney has held up deponent to contempt and ridicule and has affected his good name and reputation in the community, and that the threatened activities of defendant in the future will injuriously effect the good name and reputation of deponent and will seriously interfere with his right to earn a livelihood and continue in the employ of Beatrice Creamery Company unmolested by efforts of defendant as District Attorney to enforce said Anti-Trust law of Colorado, and deprives him of his right to carry on his business free from the restraint of said act, for all of which damages deponent will be without remedy or recourse, and said damages will be immeasurable and irreparable.

That in view of the so-called Anti-Trust Act of the State of Colorado, as set forth in the bill of complaint herein, deponent is unable to pursue his business and calling in a free and unhampered manner; he is deprived of his right to earn a livelihood and continue in the employ of Beatrice Creamery Company unmolested by said enactment, and cannot carry on his ordinary occupation without being restrained by said Anti-Trust law; that deponent by virtue of the above mentioned acts of defendant as District Attorney, is forced to devote a large portion of his time to the defense of himself against the charges and claims made [fol. 45] by the District Attorney, to the manifest injury of the business of Beatrice Creamery Company, and to the detriment of the earnings which he may receive as Manager for the State of Colorado, and is not able to render to Beatrice Creamery Company the full measure of service which he would be able to render in the absence of said statute and the activities of defendant; he dare not confer or converse with his competitors or farmers or producers of milk with reference to the economics and other essential matters entering into the conduct of the dairy and milk business; he is unable to determine, nor are his counsel able

to inform him, just what he may or may not do in the pursuit of his calling or business, without violating the terms of said Anti-Trust statute; that if said statute is held to be valid and enforceable, this deponent cannot in the future follow his business and calling in a free and unhampered manner; that the services which he would be able to render to Beatrice Creamery Company in the absence of said statute will be worth many thousands of dollars per year to said Beatrice Creamery Company and to deponent; that in view of the terms of said statute, Beatrice Creamery Company cannot pay to deponent for future services anything approaching the amount which deponent now receives, and if said statute is to remain in force and effect, deponent's earning capacity will be decreased thereby in excess of $3,000.00 per annum, to the irreparable injury and damage of this deponent, and for which deponent will have no redress.

[fol. 46] Further deponent saith not.

A. T. McClintock.

Subscribed and sworn to before me this 2nd day of November A. D. 1925. My commission expires April 16th, 1928. May Plemmons, Notary Public. (Notarial Seal.)

[File endorsement omitted]

In United States District Court

[Title omitted]

[fol. 47] Affidavit of H. Brown Cannon—Filed November 4, 1925

Before me, the undersigned, an officer authorized by law to administer oaths, personally appeared H. Brown Cannon, of lawful age, who being first duly sworn, upon oath deposes and says:

I am one of the plaintiffs in the above stated case. I have resided in the City and County of Denver, State of

Colorado, for Thirty-eight years. I am an experienced dairyman and have been engaged in the dairy business for the past thirty-eight years. I am also President of the plaintiff The Windsor Farm Dairy Company a corporation, and own stock in said corporation of an actual value in excess of One Hundred Thousand Dollars ($100,000). The Windsor Farm Dairy Company is a corporation organized and existing under and by virtue of the laws of the State of Colorado and is actively engaged in the production and distribution of milk and all of its allied products and has invested in the State of Colorado in plants, property and equipment far in excess of a quarter of a million dollars in value. The said The Windsor Farm Dairy Company is likewise engaged in interstate commerce, in buying, selling and shipping to points from without the State of Colorado to points within the State and from points within the State of Colorado to points without the State and in other states of the Union. The said corpora-
[fol. 48] tion by painstaking effort, fair dealing and careful management has thousands of customers and patrons, a well established business and trade and a good will of many thousands of dollars in value far in excess of the sum of Three Thousand Dollars ($3,000).

Deponent attaches hereto, as Exhibit A, copy of Information for Conspiracy to Violate Anti-Trust Laws, served upon him by the Clerk of the District Court in case No. 28320 pending in the District Court of the City and County of Denver. That in addition to said pending action, the defendant in the above stated case has stated that it is his purpose and intention to institute other prosecutions and to take action to forfeit the charter of The Windsor Farm Dairy Company; that such actions taken and or threatened, whether successful or not, have had the effect, and will continue to have the effect, of destroying the good will of the Windsor Farm Dairy Company bringing it into disrepute, driving away its customers, greatly diminishing the amount of its business and threatening its very life and existence, to the great damage of the said The Windsor Farm Dairy Company in the sum of many hundreds of thousands of dollars and causing irreparable damage and loss to it and its stockholders. Deponent is a stockholder of the said The Windsor Farm Dairy Company, owning

stock therein in excess of One Hundred Thousand Dollars ($100,000) that said action and contemplated threatened actions on the part of the defendant herein have already [fol. 49] lessened the value of said stock, and if continued will lessen and eventually destroy the value of said stock, and whether said prosecutions are successful or unsuccessful would in that respect damage this deponent in the sum of more than Twenty-five Thousand Dollars ($25,000).

Deponent by said actions instituted and threatened has been held up to contempt and ridicule and by the continuation of said prosecutions and the institution of other actions threatened and contemplated by the defendant will continue to be brought into contempt and ridicule before the public and his good name and reputation injured and destroyed, and in this respect unless the defendant is enjoined from further actions under color of the statute of the State of Colorado known as the Anti-Trust Act his character will be besmirched, his reputation and good name destroyed and he will be damaged in a sum in excess of Twenty-five Thousand Dollars ($25,000) or other large sum, for all of which damages deponent herein will be without remedy or recourse and said damages irreparable.

Deponent herein is an experienced dairyman. He is the active managing officer in the employ of the said The Windsor Farm Dairy Company. His services as such officer and employee are worth to said corporation and said corporation is paying to deponent for such services the sum of Fifteen Thousand dollars ($15,000.00) per year. Said business in which deponent is engaged is one of the common occupations of life.

[fol. 50] That in view of the provisions of the so-called Anti-Trust Act of the State of Colorado, as set forth in the Bill of Complaint herein, deponent is unable to pursue his business and calling in a free and unhampered manner. He is not able to render to his employer the full measure of services which he would be able to render in the absence of said statute. He dare not confer or converse with competitors and or farmer producers with reference to the economics, statistics and other essential matters entering into the economical conduct of the dairy and milk business. He is unable to determine, nor are his counsel able to inform him, just what he may or may not do in the pursuit of

his calling and business without violating the terms of said Anti-Trust Statute. That if said Statute is held to be a valid and enforcible law, this deponent cannot in future follow his calling and business in a free and unhampered manner. He will not be able to render to his employer the full measure of service to which it is entitled and which it otherwise would receive in the absence of the provisions of said Statute. That the services which he can and will be able to render to said employer in the absence of said Statute will be worth many thousands of dollars per year to his said employer more than the services which he is able to render in view of the provisions of said Statute. That in view of the terms of said Statute The Windsor Farm Dairy Company will not and cannot pay to this deponent [fols. 51-60] for future services anything approaching the amount which deponent now receives, and that if said Statute is to remain in force and effect deponent's earning capacity will be decreased thereby in a sum not less than Three Thousand Dollars ($3,000) per annum, to the irreparable injury and damage of this deponent, and deponent will have no redress therefor.

Further deponent saith not.

H. Brown Cannon.

Subscribed and sworn to before me this thirty-first day of October, 1925. My commission expires May 8, 1927. Helen R. Herian, Notary Public. (Notarial Seal.)

[fol. 61] [File endorsement omitted]

In United States District Court

[Title omitted]

Affidavit of Morris Robinson—Filed November 4, 1925

United States of America,
State of Colorado,
City and County of Denver, ss.

Morris Robinson, being first duly sworn on oath deposes and says: That he is one of the plaintiffs above named; that he has resided in the State of Colorado for thirty-two

years last past; that he is the President of The Climax Dairy Company, a Colorado corporation, one of the plaintiffs [fol. 62] herein and has during all of that time been actively engaged in the creamery business and in the buying and selling of milk products; and by virtue of the said business and experience has become and now is an experienced dairyman; that affiant has been the President of The Climax Dairy Company during the past twelve (12) years; that he now owns stock in the said Company of an actual value in excess of Seventy Five Thousand ($75,000.00) Dollars; that the said The Climax Dairy Company is actively engaged in the production and distribution of milk and milk products and is now and has been for many years past conducting a large and varied business in the State of Colorado consisting of the manufacture, sale and distribution of butter, milk and milk products, ice cream and eggs and has invested in the State of Colorado in plants, property and equipment more than the sum of One Hundred Thousand ($100,000.00) Dollars.

That by painstaking effort and careful management the said The Climax Dairy Company has gained hundreds of customers and developed a well established trade and has developed and does now possess a good name and a good will worth many thousands of dollars in value and far in excess of the sum of Three Thousand ($3,000.00) Dollars.

That the affiant and The Climax Dairy Company are defendants in the case of People vs. H. Brown Cannon, et al., being No. 28329, pending in the District Court of the City [fol. 63] and County of Denver, State of Colorado.

That in addition to said pending action the defendant herein as District Attorney has stated that it is his purpose and intention to institute other proceedings and prosecutions and to take action to forfeit the charter of The Climax Dairy Company; that such actions taken, and or whether successful or not, have had the effect and will continue to have the effect of destroying the good name and good will of The Climax Dairy Company and of the affiant, bringing The Climax Dairy Company and affiant into disrepute, driving away customers and threatening the very life and existence of The Climax Dairy Company and causing irreparable and immeasurable damage to the affiant, to The Climax Dairy Company and to its stockholders; that as a result of the said prosecution of the said case in the District Court of the

City and County of Denver, various newspaper articles have appeared holding up affiant and The Climax Dairy Company to public condemnation, disrepute, contempt and ridicule, as will be more fully seen from an inspection of the said newspaper articles which are hereto attached and hereby made a part hereof.

That affiant is employed at a salary in excess of Seven Thousand ($7,000.00) Dollars per year; that the said action of the defendant in instituting and urging said case to trial, and in threatening further and additional contemplated actions in the future has lessened the value of the business [fol. 64] of The Climax Dairy Company and will directly affect the earnings of the said Company and the earnings which the affiant will receive for his services as President of the said Company; and if said acts are continued by defendant as District Attorney, the value of the holdings of the affiant in the said Company will be further depreciated and whether the said prosecutions and threatened prosecutions successful or not, would damage this affiant in the sum of more than Twenty Five Thousand ($25,000.00) Dollars.

Affiant says that the actions of defendant as District Attorney has held up affiant to contempt and ridicule and has affected his good name and reputation in the community, and that the threatened activities of the defendant in the future will injuriously affect the good name and reputation of the affiant and will seriously interfere with his ability to earn a livelihood and continue in the employ of The Climax Dairy Company unmolested by the efforts of the Defendant as District Attorney to enforce said Anti Trust Law of Colorado and deprive affiant of his right to carry on his business free from the restraint of the said act, for all of which damages affiant will be without remedy or recourse and the said damages will be immeasurable and irreparable.

That in view of the so-called Anti-Trust Act of the State of Colorado, as set forth in the bill of complaint herein, affiant is unable to pursue his business and calling in a free [fol. 65] and unhampered manner; he is deprived of his right to earn a livelihood and continue in the employ of The Climax Dairy Company unmolested by said enactment, and cannot carry on his ordinary occupation without being restrained by said Anti-Trust Law; that affiant by virtue of

the above mentioned acts of defendant as District Attorney, is forced to devote a large portion of his time to the defense of himself against the charges and claims made by the District Attorney, to the manifest injury of the business of The Climax Dairy Company, and to the detriment of the earnings which he may receive as President of said Company, and is not able to render to said Company the full measure of service which he would be able to render in the absence of said statute and the activities of defendant; he dare not confer or converse with his competitors or farmers or producers of milk with reference to the economies and other essential matters entering into the conduct of the dairy and milk business; he is unable to determine, nor are his counsel able to inform him, just what he may or may not do in the pursuit of his calling or business, without violating the terms of said Anti Trust statute; that if said statute is held to be valid and enforceable, this affiant cannot in the future follow his business and calling in a free and unhampered manner; that the services which he would be able to render to The Climax Dairy Company in the absence of said statute will be worth many thousands of dollars per year to said The Climax Dairy Company and to [fols. 66-118] affiant; that in view of the terms of said statute, The Climax Dairy Company cannot pay to affiant for future services anything approaching the amount which affiant now receives, and if said statute is to remain in force and effect, affiant's earning capacity will be decreased thereby in excess of Three Thousand ($3,000.00) Dollars per annum, to the irreparable injury and damage of this affiant, and for which affiant will have no redress.

Further affiant saith not.

Morris H. Robinson.

Subscribed and sworn to before me this 3rd day of November, A. D. 1925. My commission expires ——— —, ———. My commission expires October 30, 1927. Noah Adler, Notary Public. (Notarial Seal)

[fol. 119] In United States District Court

[Title omitted]

Order Granting Interlocutory Injunction—November 14, 1925

This cause came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, It is Ordered, Adjudged and Decreed, as follows:

That Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Compiled Laws, Colorado, 1921, Sections 4066-44, is unconstitutional and void as being violative of Art. XIV of the amendments to the Constitution of the United States, in accordance with opinion filed herein.

It is, therefore, ordered, adjudged and decreed that the writ of interlocutory injunction issue, enjoining defendant [fol. 120] Foster Cline, as District Attorney, for the City and County of Denver, State of Colorado, his deputies, agents and successors, from prosecuting or instituting against the plaintiffs herein, or any of them, any proceedings for the enforcement of said law, and from prosecuting or instituting any proceedings against the plaintiffs, or any of them, for the violation of, or conspiracy to violate, said act, or any part thereof, and from attempting to enforce against the plaintiffs or any of them, any of the remedies or penalties of said act, or any part thereof, and he is enjoined from taking any further action in the prosecution or trial of that certain criminal proceeding pending in the District Court City and County of Denver, State of Colorado, being No. 28329, Div. VI of said Court, styled The People of the State of Colorado, vs. H. Brown Cannon, et al., and being entitled "Information for conspiracy to Violate Anti-Trust Laws."

The Clerk of this Court is ordered and directed to issue the writ in conformity herewith.

[fol. 121] In United States District Court

[Title omitted]

Final Decree—December 14, 1925

This cause came on to be heard at this term, and the defendant in error having elected to stand upon his motion to dismiss and refusing to plead further, and parties hereto having stipulated in open court that we might consider as evidence the affidavits and documents of file and considered by us upon the hearing for an interlocutory injunction, and we being of the opinion and having reached the conclusion [fols. 122-125] that Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Compiled Laws of Colorado, 1921, and in Secs. 4036 to 4043, inclusive thereof, is unconstitutional and void as being violative of Article XIV of the Amendments to the Constitution of the United States in accordance with our written opinion as filed herein:

It is therefore, ordered, adjudged and decreed that the prayers of plaintiffs are granted and that the writ of permanent injunction issue perpetually enjoining defendant Foster Cline as District Attorney for the City and County of Denver, State of Colorado, his deputies, assistants, agents and successors from continuing the prosecution and from instituting against the plaintiffs herein, or any of them, any proceedings whatsoever for the enforcement of said law and from instituting or prosecuting any proceedings against the plaintiffs, or any of them, for the violation of or conspiracy to violate said act, or any part thereof, and from attempting to enforce in any manner against the plaintiffs, or any of them any of the remedies or penalties of said act, or any part thereof.

Plaintiffs may have judgment for their costs in this matter expended. The Clerk of this Court is ordered and directed to issue the writ in conformity herewith. Defendant saves exceptions.

[fol. 126] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL FILED JANUARY 9, 1926, AND ORDER ALLOWING SAME

To the Honorable J. Foster Symes, Judge of the District Court of the United States for the District of Colorado:

[fol. 127] The above named defendant, feeling himself aggrieved by the decree made and entered in this cause on the fourteenth day of December, A. D. 1925, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the Assignments of Error, which are filed herewith, and for the further reason that in this suit a final decree has been entered granting a permanent injunction suspending the enforcement of a statute of the State of Colorado; and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

J. P. O'Connell, A. L. Bethe, Paul M. Segal, Harold C. Thompson, Solicitors for the Defendant.

[fol. 128] The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of five hundred dollars.

J. Foster Symes, Judge of the District Court of the United States for the District of Colorado.

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed January 9, 1926

[fol. 129] Comes now the appellant and alleges that the final decree entered by the Court below in the above cause is erroneous and unjust to the appellant in this, viz:

I

The Court erred in making and entering a decree granting an injunction against the further prosecution by the appellant, his deputies, assistants and successors of a criminal case then pending in the district court of the Second Judicial District of the State of Colorado, and which had been pending in said Colorado court at the time of the institution of this suit by the complainants herein.

II

The Court erred in making and entering a decree granting an injunction against the taking of further steps in the prosecution by the appellant, his deputies, assistants, and successors, in the district court of the Second Judicial District of the State of Colorado, of case No. 28320, Division VI, in said Colorado Court, wherein the People of the State of Colorado are plaintiff, and the complainants herein are among the defendants, said criminal case being then pending at the time of the institution of this suit by the complainants herein.

[fol. 130] III

The Court erred in assuming jurisdiction to enjoin the prosecution of a suit then pending in a court of the State of Colorado.

IV

The Court erred in assuming jurisdiction to enjoin the prosecution of a suit in a court of the State of Colorado which was pending at the time this suit was instituted by the complainants herein.

V

The Court erred in assuming jurisdiction to interfere by injunction with the prosecution and further prosecution by the appellant herein of case No. 28320, Division VI, in the District Court of the Second Judicial District of the State of Colorado (a court of the state of Colorado), in which case the People of the State of Colorado were plaintiff and the complainants herein were among the defendants, and which case was pending at the time of the commencement of this suit by complainants herein.

VI

The Court erred in holding and adjudging that Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Sections 4036 to 4043 inclusive of the Compiled Laws of Colorado of 1921 is unconstitutional and void.

[fol. 131]

VII

The Court erred in holding and adjudging that Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Sections 4036 to 4043 inclusive of the Compiled Laws of Colorado of 1921 is unconstitutional and void as being in violation of Article XIV of the Amendments to the Constitution of the United States.

VIII

The Court erred in holding and adjudging that Chapter 161 of the Session Laws of the State of Colorado for the year 1913 was rendered unconstitutional and void by the enactment of Chapter 141 of the Session Laws of the State of Colorado for the year 1923.

IX

The Court erred in holding and adjudging that Chapter 141 of the Session Laws of Colorado for the year 1923 created an exception to the operation of Chapter 161 of the Session Laws of the State of Colorado for the year 1913 and that such exception was unconstitutional as being in

violation of Article XIV of the Amendments to the Constitution of the United States, and rendered unconstitutional the said Chapter 161 of the Session Laws of the State of Colorado for the year 1913.

[fol. 132-139] Wherefore, appellant prays that the decree of the Court below be reversed.

Joseph P. O'Connell, Joseph P. O'Connell, A. L. Betke, A. L. Betke, Paul M. Segal, Paul M. Segal, Harold C. Thompson, Harold C. Thompson, Wm. L. Boatright, William L. Boatright, Attorney General; Charles Roach, Charles Roach, Deputy Attorney General; Jean S. Breitenstein, Jean S. Breitenstein, Assistant Attorney General, Solicitors for Appellant.

[fol. 140] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Lewis, Circuit Judge, and Kennedy and Symes, District Judges

OPINION—Filed November 14, 1925

[fol. 141] LEWIS, Circuit Judge, delivered the opinion of the court:

These are suits to enjoin the enforcement of an Act of the Colorado General Assembly approved April 7, 1913, Session Laws 1913, p. 613, commonly known as the Colorado Anti-Trust Act, on the alleged ground that it is in conflict with the Fourteenth Amendment to the Constitution of the United States, in denying to plaintiffs equal protection of the laws and, if enforced will deprive plaintiffs of their property without due process. A corporation is within the protection of those clauses of the amendment, Covington & L. Co. v. Sandford, 164 U. S. 578. The Beatrice Creamery Company is alleged to be a corporate citizen and resident of the State of Delaware. The three corporations in the other case were organized under the

laws of Colorado, and the four individual plaintiffs in that case are stockholders, directors and officers of one or of the other of the four corporations named, and are respectively in charge of the management of said corporations, all of which are engaged in the purchase, sale and distribution of milk and dairy products at Denver and other places in Colorado. They each have large investments in property in Denver, one at Pueblo, also necessary for the transaction of their business in supplying their customers with milk and milk products. The defendant Cline is the District Attorney for the Second Judicial District of the State and it is made his duty to institute and prosecute [fol. 142] criminal cases for offenses against the laws of the State within that district.

After stating the jurisdictional amount of the matter in controversy and that the suits arise under the Constitution of the United States, it is alleged in each complaint that defendant, acting under the provisions and requirements of said Anti-Trust Act, filed an Information in the criminal division of said District Court in which plaintiffs are charged with a conspiracy to violate said Anti-Trust Act, that plaintiffs were arraigned, plead not guilty, and the case has been set down for trial. A copy of the Information, attached to an affidavit in support of the bill, has been exhibited. It charges the four corporations and the four individuals who appear here as plaintiffs with the same conspiracy in five different counts, to unlawfully fix and control the price of milk and milk products, each count stating the charge in different form, to comply with the varying terms of the definitions given by the Act of an unlawful conspiracy. The Information was filed on August 22, 1925, and these bills were brought, one on October 27 and one on October 29, 1926. The Act, in its definition of unlawful trusts and combinations, is in the usual terms of such legislation. It prohibits and makes unlawful a combination of two or more persons or corporations for the purpose of creating or carrying out any restrictions in trade or commerce, the prevention of competition in the manufacture, making, transportation, sale or purchase of [fol. 143] merchandise, produce or other commodities, the fixing of any standard of figures whereby the price to the public of any article or commodity of merchandise, produce

or commerce intended for sale, use or consumption in this State shall, in any manner, be controlled or established, the making or entering into any contract or agreement of any kind, by which the parties shall bind themselves not to sell, manufacture, dispose of or transport any article or commodity below a common standard figure, or to keep the price of such article commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or of transportation between themselves or between themselves and others, so as to preclude a free and unrestricted competition, or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity so that its price may be in any manner affected. Following the definitions of the unlawful trusts and combinations which the Act prohibits it continues:

"And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed; provided further that it shall not be deemed to be unlawful, or [fol. 144] within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or own any interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodities; and provided further that labor whether skilled or unskilled, is not a commodity within the meaning of this act."

The Act makes it the duty of the Attorney General of the State and of the District Attorney of any district in which a violation of any of the provisions of the Act by a corporation or any of its officers or agents occurs, to institute an action in any court of the State having jurisdiction, for the forfeiture of the charter, rights and franchise of such corporation and its dissolution. A violation of the Act prohibits the corporation from doing any further business in

the State and subjects the corporation, its officers and agents to prosecution as for a misdemeanor, and on conviction to fine and imprisonment. It provides that any contract or agreement in violation of any of the provisions of the Act shall be absolutely void and not enforcible in any of the courts of the State, and that when any civil action shall be commenced in any court of the State it shall be lawful to plead in defense thereof that the cause of action sued upon grew out of a contract or agreement in violation of the Act.

[fol. 145] The complaints allege that the defendant threatens to file other criminal informations charging plaintiffs with other violations of the Act, and to institute proceedings to forfeit the charters of the corporate plaintiffs and to oust them from transacting any further business in the State, and if not restrained he will proceed to do so. They charge that the institution and pendency of the Information in the State court, the publicity that has been given to it and the avowed purpose of the defendant to institute other proceedings, civil and criminal against plaintiffs have been a constant threat and menace to the business of the plaintiffs, that plaintiffs' good will and business, which they had built up through many years of labor and effort, have been and will continue to be seriously injured and irreparably damaged because thereof and because of the publicity which has been and will continue to be attendant upon such activities of the defendant. Affidavits in support of the bills show that plaintiffs have already suffered damages in large amounts from loss of business due to the defendant's filing the Information and his threats to institute other civil and criminal proceedings under the Act and that the individual plaintiffs have suffered and will continue to suffer financial loss through depreciation of their stock holdings in the corporations, each in excess of three thousand dollars.

The main point of contention is over the question of the [fol. 146] validity of the State Anti-Trust Act. If that Act is not in conflict with the Fourteenth Amendment the plaintiffs have no case. The first proviso in the paragraph above quoted from the Act is relied on by plaintiffs' counsel as rendering the whole Act void because of the rule announced by the Supreme Court in United States v. Cohen Grocery

Co., 255 U. S. 81; International Harvester Co. v. Kentucky, 234 U. S. 216; and other like cases; it being argued that the only combinations denounced by the Act are those which may be formed for the purpose of conducting business at an unreasonable profit, and that the Act affords no measure by which it can be determined what profits are reasonable and what are not reasonable. We are not willing to now so construe either of the provisos quoted. The whole Act and all kinds of prosecutions under it, civil and criminal, are challenged. It defines and prohibits combinations which may operate as restrictions on trade, which in no way deal with the subject of prices of commodities or the profits to be realized on the sale thereof. It was so construed by the Colorado Supreme Court in Campbell v. People, 72 Colo. 213. In that case the conviction was on a charge that the unlawful agreement between the defendants, who constituted an association of master plumbers, was that none but members in good standing of a named local union could be employed by the defendants. The court said:

"We do not agree that the sole purpose of the Act was to prevent a restriction of dealing in commodities, but think that it was also to prevent the restriction of competition [fol. 147] and the attainment of the control of a business, i. e. monopoly."

Many well known methods can be resorted to by those in combination to restrict or destroy competition and affect prices and profits by indirection—the division of territory between them, and other well known methods. Neither in the Campbell case nor in Johnson v. People, 72 Colo. 218, and People v. Apostolos, 73 Colo. 71, in all of which convictions under the Anti Trust Act were sustained, did the Supreme Court consider the constitutionality of the Act. The two last cases referred to dealt with combinations to increase prices. But we take those rulings of the Supreme Court as an implied conclusion on its part that the Act was valid as the law of the State then stood. The last of those opinions was rendered on March 5, 1923.

We come now to consider another ground on which the Act is said to be invalid. On March 30, 1923, what is known as "The Co-operative Marketing Act" was passed by the

Colorado General Assembly and approved by the Governor with an emergency clause. Session Laws 1923, p. 420. It provides that eleven or more persons, a majority of whom are residents of this State, engaged in the production of agricultural products, may form a non-profit co-operative association, with or without capital stock. It defines the term "agricultural products" as including horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products; that the powers of such association shall be [fol. 148] to engage in any activity connected with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any agricultural products brought or delivered to it by its members, or the manufacturing or marketing of the by-products thereof, or in any activity connected with the purchase, hiring or use by its members of supplies, machinery or equipment, or in the financing of any such activities, and it may in its articles assume the right to handle the products of non-members, but, in such event, the association shall not handle for non-members a volume of products greater in the aggregate than the aggregate of products handled by it for its own members; such associations are given the right to act as agents of its members in any of said activities; to do everything conducive to or expedient for the interests or benefit of the association and to contract accordingly; to admit as members only those engaged in the production of agricultural products to be handled by or through the association; to issue certificates of membership to its members; to make marketing contracts between the association and its members requiring the members to sell, for any period of time not over ten years, all or any specified part of their agricultural products or commodities exclusively to or through the association, or any facilities to be created by the association; to make by-laws fixing a specific sum as liquidated dam- [fol. 149] ages to be paid by a member to the association upon breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; it provides that any two or more associations may unite in using, or may separately use the same persons, methods, means and agencies for carrying on and conducting their business; and then, actuated by knowledge of the

real character of the organizations which the Act authorizes, its sections 22 and 29 read thus:

(22) "Any provisions of law which are in conflict with this Act shall be construed as not applying to the associations herein provided for";

(29) "No association organized hereunder and complying with the terms hereof shall be deemed to be a conspiracy or a combination in restraint of trade or an illegal monoply; or an attempt to lessen competition or to fix prices arbitrarily nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this Act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose."

Nothing can be plainer than that these combinations authorized through the formation of the associations as provided for in the Act would, in fact, be combinations in restraint of trade and an attempt to lessen competition in the marketing of agricultural products. A declaration that they should not be so considered is as futile as a statement that white is black. Of course, we do not pretend to say that the legislature did not have the power to exempt such [fol. 150] combinations from prosecution and dissolution as unlawful common law or statutory trusts. That was entirely a matter for its consideration. In a decision by the State Supreme Court, rendered on October 19, 1925, and not yet reported, this Act was sustained. That court, in answering the contention that such an association was in restraint of trade and void under the Colorado Anti-Trust Law said:

"It is objected that the contract is in restraint of trade and so void under the Colorado Anti-Trust Law, C. L. 1921, Secs. 4036-4044, but the Act of 1923, being the later Act controls the earlier."

There can be no doubt that the later Act exempted the associations which it authorized from the penalties and restrictions of the earlier Act. The Supreme Court of the United States, in Connolly v. Union Sewer Pipe Co., 184 U. S. 540

had under consideration an Act of the legislature of the State of Illinois defining unlawful combinations, very much in the same terms as the Colorado Act of 1913, the ninth section of which reads thus:

"The provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

and the question there, as here, was whether the Sewer Pipe Company in disposing of its products while a member of a prohibited combination, was under the Act denied equal protection of the laws. In disposing of the question that court said:

[fol. 151] "A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not evade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another or favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates. • • •

"Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it

may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural produces and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the [fol. 152] statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? * * * We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

We reach a like conclusion as to the Colorado Anti-Trust Act.

The District Attorney, and the Attorney General of the State, who also made argument and submitted brief, do not deny that it is the duty of the court, on the facts stated, to grant the writ enjoining the institution of further court proceedings, civil and criminal if we hold the Anti-Trust Act to be unconstitutional; but it is earnestly and ably argued by the District Attorney that the court is without right to direct the issuance of its writ against him staying

[fol. 153] further prosecution of plaintiffs on the Information that had been filed prior to the institution of these suits. On consideration of the contention of the District Attorney we think a fact not heretofore stated is of great importance. It is this: The pleadings here and affidavits in support disclose that the State District Judge overruled motions to quash the Information, declined to hear further argument from defendants' counsel in that case on the unconstitutionality of the State Anti-Trust Act, and has set that case down for trial at an early date. Under the State practice defendants in a criminal case cannot be heard in the State Supreme Court until after conviction, and the removal of their case to that court after the happening of that event, and putting it in condition to be finally heard there, requires time, frequently extended by unexpected delays. We are further informed by the proof that the record in that case will necessarily be voluminous. The four corporate defendants are jointly charged; their books and records will become competent proof in arriving at the question as to what are reasonable prices and profits for their products, which will involve a full investigation of the business of each company and require expert testimony. Such a record cannot be put in shape for the appelate court until after the lapse of many months. In the meantime the Act prohibits them from transacting any business in the State of Colorado. A verdict of guilty will be conclusive proof that they have violated the State Anti-Trust Act. It will [fol. 154] also be conclusive proof in a suit to forfeit their rights and franchises and dissolve them, and a good defense in actions they may bring against their debtors. Under the charges made in the bills it therefore seems clear that further prosecution of the pending Information is but a step in the invasion of their property rights, and if continued those rights will be wholly destroyed under an invalid law. It is a general principle well understood that a court of equity has no jurisdiction over the prosecution and punishment of crimes, and ordinarily will not sustain a bill to restrain or relieve against proceedings of that kind. In re Sawyer, 124 U. S. 200; Harkrader v. Wadley, 172 U. S. 148; Ex parte Young, 209 U. S. 123. There are, however, well established exceptions to this rule. The writ will be granted to stay the institution of criminal proceedings by a party to the cause, that would put in issue the

same right which is in issue in the pending cause; the writ will also issue to prohibit the invasion of the rights of property by the enforcement of an unconstitutional law. It is the latter exception with which we are now concerned. We think there will be invasion of property rights, even destruction of them, if the pending prosecution is permitted to continue under this unconstitutional statute; and in that condition of the case there can be no difference in principle whether the criminal proceedings are instituted before or after the bill was filed. We think the Supreme [fol. 155] Court has so ruled in Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207. There the criminal prosecution was started first, and in answer to the argument based on that fact it was said:

"It would seem that if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding. Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551, 558."

In the case there cited with approval the vice-chancellor said:

(p. 558:) "The jurisdiction of this court is to protect property, and it will interfere by injunction to stay proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate destruction of property, or make it less valuable or comfortable for use or occupation."

We find no contrary ruling to that made in the Davis & Farnum cases. The subject has received general comment in several late cases, but the particular question we have was not discussed. Philadelphia v. Stimson, 223 U. S. 605; Truax v. Raich, 239 U. S. 33; Kennington v. Palmer, 255 U. S. 100; Terrace v. Thompson, 263 U. S. 197; Packard v. Banton, 264 U. S. 140; Hygrade Provision Co. v. Sherman 266 U. S. 497. In most of these cases the legislation under consideration was sustained as valid, the prosecutions were only threatened, not pending, and there was no occasion to determine the point now in mind, it was not

passed on. Where a criminal prosecution results directly [fol. 156] in the invasion and destruction of property rights, we do not doubt that it is within the power and duty of a court of equity to enjoin the administrative officer who has charge of the prosecution if there be no valid law on which the accusation rests. The claimed difference, under those conditions, between pending and threatened cases is, in our judgment, without substance. We venture to say, on the authority of the Davis & Farnum case, that it can make no difference, on the question of jurisdiction when prosecution is begun under an invalid law, whether before or after a bill is exhibited, if there be an unlawful invasion by virtue thereof of property rights.

A temporary writ of injunction as prayed may issue in each case. The defendant may answer as he is advised.

[File endorsement omitted]

[fol. 157] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed November 14, 1925

SYMES, D. J.:

This case as it now stands presents two questions for consideration. First, whether the act in question violates the Constitution of the United States for any of the reasons set up in the bill and, Secondly, if the act is unconstitutional, should this Court grant an injunction restraining the defendant from prosecuting the suit already instituted in the State court?

After reviewing all the authorities cited, and such others [fol. 158] as I have thought pertinent to the issues involved, I prepared a somewhat lengthy memorandum as a basis for discussion in conference. But as I am in accord with the majority opinion in most of the conclusions announced, I do not believe it necessary to do more at this time than to state very briefly the reasons why I regret I cannot agree with the Court on the second point.

First, I am of the opinion that the statute in question is unconstitutional and void, for the reasons stated in the majority opinion.

Second, In re Sawyer, 124 U. S. 200; Fitts v. McGhee, 172 U. S. 516; Ex parte Young, 209 U. S. 123, and the numerous cases citing and affirming these three, down to and including Hygrade Provision Company v. Sherman, 266 U. S. 497, lay down the general rule that the Federal courts have the right to proceed without interference, when they first assume jurisdiction in a suit involving the unconstitutionality of a state act, such as in the case at bar, and to that end may restrain all proceedings, civil or criminal in the state courts thereafter brought, and may restrain a state officer from acting under an unconstitutional act, as the state law affords him no protection, such suit in the Federal Court not being one against the state. But I find no clear case in the Supreme Court holding that the Federal courts can restrain criminal proceedings already pending in the state court, brought under an un-[fol. 159] constitutional state law, where the defendants can raise the Federal questions, with the right to an appeal to the highest court of the state, and then to the Supreme Court of the United States in turn. I am of the opinion that the clear language of the three cases referred to above specifically prohibit such action.

Davis & Farnum v. Los Angeles, 189 U. S. 207, is cited in the cases heretofore discussed, and approves In re Sawyer and Fitts v. McGhee. The language on p. 218 might be said to authorize an injunction against criminal proceedings already pending, but granting this, I do not think it overcomes the great weight of authority, both before and after this case, which states the rule otherwise. For instance, In re Young, a later case, says specifically, p. 162:

"But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court."

In conclusion, I am of the opinion that proceedings of any nature threatened to be brought under this act against these defendants should be restrained, but that the injunction asked for to prevent the defendant from proceed-

ing further in the suit now pending in the state court should be denied.

November 14, 1925.

[fol. 160] Clerk's certificate to foregoing opinions omitted in printing.

[fol. 161] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Appellant of Parts of the Record to be Printed, with Proof of Service.—Filed February 24, 1926

Comes now the appellant above named, by his attorneys and files this his statement of the points upon which he intends to rely in his appeal of the above cause to this Court, and his statement of the parts of the record which he deems necessary for the consideration thereof, viz:

The points upon which he intends to rely are as follows:

I

The Court below erred in making and entering a decree granting an injunction against the further prosecution by the appellant, his deputies, assistants and successors in the [fol. 162] District Court of the Second Judicial District of the State of Colorado of Case No. 28329, Division 6 in said Court wherein the People of the State of Colorado are plaintiff, and the complainants herein are among the defendants, said criminal case being then pending in said Court and having been pending at the time of the institution in the Court below of this suit by the complainants herein.

II

The Court below erred in assuming jurisdiction to enjoin the prosecution of a suit in a Court of the State of Colorado which was pending at the time this suit was instituted in the Court below by the complainants herein.

III

The Court below erred in assuming jurisdiction to interfere by injunction with the prosecution by the appellant

herein of Case No. 28320, Division 6 of the District Court of the Second Judicial District of the State of Colorado, in which case the People of the State of Colorado were plaintiff and the complainants herein were among the defendants, and which case was pending at the time of the commencement of this suit by complainants herein.

IV

The Court below erred in holding and adjudging that Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Sections 4036 to 4043 inclusive of the Compiled Laws of Colorado of 1921 is unconstitutional and void.

V

[fol. 163] The Court below erred in holding and adjudging that Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Sections 4036 to 4043 inclusive of the Compiled Laws of Colorado of 1921 is unconstitutional and void, as being in violation of Article XIV of the Amendments to the Constitution of the United States.

VI

The Court below erred in holding and adjudging that Chapter 141 of the Session Laws of Colorado for the year 1923 created an exception to the operation of Chapter 161 of the Session Laws of the State of Colorado for the year 1913 and that such exception was unconstitutional as being in violation of Article XIV of the Amendments to the Constitution of the United States, and rendered unconstitutional the said Chapter 161 of the Session Laws of the State of Colorado for the year 1913.

The parts of the record which the appellant deems necessary for the proper consideration of this appeal are as follows:

1. The bill of complaint
2. Motion to dismiss
3. First Amendment to the complaint
4. Second amendment to the complaint

5. Order of Court Granting Interlocutory Injunction
6. Election of defendant to stand upon motion to dismiss and refusal to plead further.
7. Final decree
8. Assignments of error.

[fol. 164] Dated this twentieth day of February, 1926.

Wm. L. Boatwright, Attorney General; Charles Roach, Deputy Attorney General; Jean S. Breitenstein, Assistant Attorney General; Joseph P. O'Connell, A. L. Betke, Paul M. Segal, Harold Clark Thompson, Attorneys for Appellant.

We, the undersigned, hereby acknowledge that we and each of us have this twentieth day of February A. D. 1926, received a copy of the foregoing statement of the appellant of the points upon which he intends to rely and of the portions of the record which he deems necessary for the proper consideration of the appeal in the foregoing complaint.

Robert D. Hawley, by H. M. Costello, Wilbur F. Dennous, Hudson Moore, A. J. Fowler, Ernest R. Fowler, Simon J. Heller, Attorneys for Appellees.

[fol. 165] [File endorsement omitted.]

[fol. 166] In Supreme Court of the United States

Designation by Appellees of Additional Parts of the Record to be Printed—Filed March 2, 1926

Come now the appellees above named, by their counselors, and designate the following additional portions of the record not heretofore designated by the appellant which appellees deem it necessary to be printed for the proper consideration of the matters in controversy by this Honorable Court:

[fol. 167] The additional portions of the record herein designated are:

1. The written opinion of the trial court.
2. The affidavit of witness H. Brown Cannon.

3. The affidavit of witness Clarence Frink.
4. The affidavit of witness A. T. McClintock.
5. The affidavit of witness Morris Robinson.
6. The affidavit of witness Wilbur F. Denious.
7. The affidavit of witness Simon J. Heller.

Wilbur F. Denious, Hudson Moore, A. J. Fowler, Ernest B. Fowler, Counselors for appellees.

[fol. 168] [File endorsement omitted.]

Endorsed on cover: File No. 31,719. Colorado D. C. U. S. Term No. 304. Foster Cline, as district attorney for the city and county of Denver, State of Colorado, appellant, vs. Frink Dairy Company, the Windsor Farm Dairy Company, the Climax Dairy Company. Filed February 24th, 1926. File No. 31,719.

SUBJECT INDEX

CASES CITED

No. 31719

In the Supreme Court of the United States.

OCTOBER TERM, 1926

No. 304

FOSTER CLINE, as District Attorney for the City and County of Denver, State of Colorado,

Appellant,

vs.

FRINK DAIRY COMPANY, THE WINDSOR FARM DAIRY COMPANY THE CLIMAX DAIRY COMPANY,

Appellees.

Appeal from the District Court of the United States for the District of Colorado.

BRIEF OF APPELLANT

INTRODUCTION.

The decision from which this appeal is taken is reported as *Frink Dairy et al. vs. Cline, District Attorney for City and County of Denver, Colo.*, (District Court, D. Colorado, November 14, 1925), 9 Fed. (2d) 176. It is there jointly reported with *Beatrice Creamery Co. vs. Cline, etc.*, a companion case involving the same questions but from which no appeal is now taken.

Final judgment of the District Court of the United States for the District of Colorado, in the form of a permanent injunction against appellant from further prosecuting a pending case against appellees in the District Court of the City and County of Denver, State of Colorado, or from instituting any further similar prosecutions, was entered December 14, 1925 (R. 33), and, in effect, makes permanent the interlocutory injunction of November 14, 1925 (R. 32), by reason of appellant electing (R. 33) to stand upon his motion to dismiss which was filed November 2, 1925 (R. 12).

Appellant contends that in entering these two injunctions, the Court below erred, first, in enjoining a pending prosecution in the state court and erred, second, in declaring unconstitutional an act of the Colorado General Assembly approved April 17, 1913, Session Laws 1913, p. 613, commonly known as the Colorado Anti-Trust Act, which is found quoted at R. 4, 5 and 6. The rulings of the court below on these two points are at pages 32, 33, 45 and 48 of the record.

This appeal is brought directly to the Supreme Court of the United States under Section 266 of the Judicial Code, which gives this court jurisdiction.

(See Pullman Company vs. Croon, 231 U. S. 571.)

STATEMENT OF THE CASE.

The case may be concisely stated as follows:

On the twenty-ninth day of October, 1925, the appellees, The Frink Dairy Company, a corporation, the Windsor Farm Dairy Company, a corporation, The Climax Dairy Company, a corporation, H. Brown Cannon, Clarence Frink, A. T. McClintock and Morris Robinson, as plaintiffs, filed in the United States District Court for the District of Colorado their bill of complaint in equity against appellant Foster

Cline, as District Attorney for the City and County of Denver, State of Colorado, as defendant. The allegations of the bill of complaint (referring to the parties as they were designated below) are substantially as follows:

That the plaintiff companies are duly incorporated in Colorado and that the individual plaintiffs are residents of Colorado (R. 1); that the defendant is the District Attorney of the City and County of Denver, Colorado (R. 1); that the amount in controversy is sufficient to confer jurisdiction (R. 2); that the suit involves the constitutionality of the Colorado anti-trust Act (R. 2); that the plaintiff companies are engaged in the milk business in Denver and Colorado under a large investment (R. 2); that the individual plaintiffs are officers and stockholders of the various companies (R. 3); that the relief sought is necessary to protect the investments and property of the plaintiffs (R. 3); that Chapter 161 of the Session Laws of the State of Colorado for 1913 provides as follows: (here the statute is quoted) (R. 3, 4, 5, 6); that the said act is void because (1) it violates Article XIV of the amendments to the Constitution of the United States, because it is uncertain and delegates legislative powers and inflicts cruel and unusual penalties (R. 7); (2 and 3) it violates this same amendment by denying equal protection of the laws (R. 7); (4) it violates Section 16 of Article II of the Colorado Constitution in failing to fix a standard of criminality (R. 8); (5) it violates Section 25 of Article II, the due process provision of the Constitution of the State of Colorado (R. 8), and that (6) it violates Article III of the Constitution of the State of Colorado by delegating legislative powers to the judicial branch of the State government (R. 8); that the plaintiffs have had certain meetings to discuss their business, but have not discussed anything with the producers of milk (R. 9); that the defendant in his capacity

of District Attorney has contended that the plaintiffs are violating the said Colorado Anti-Trust Act and is engaged in prosecuting a case, Number 28320, in Division VI of the District Court of the City and County of Denver, wherein all of the plaintiffs are defendants charged criminally with the violation of the said act, which said case is set for November 9, 1925, for trial and that defendant has announced that he will try the said criminal case; that the defendant and a grand jury are continuing to investigate the businesses of the plaintiffs to their great injury (R. 10); that the existence of the said Anti-Trust Act is a constant menace to the businesses of the plaintiffs (R. 10, 11); that the plaintiffs are entitled to equitable relief (R. 11).

The bill of complaint then prays: (1) that the defendant be required to answer (R. 11); (2) that the defendant be enjoined from enforcing the Anti-Trust Act against the plaintiffs and from taking any further steps in the prosecution of the case numbered 28320 in Division VI of the District Court of the City and County of Denver against the plaintiffs (R. 12); (3) that the Anti-Trust Act be declared unconstitutional and void (R. 12).

On November 2, 1925, the defendant (appellant) filed his motion to dismiss in the usual form for want of equity (R. 12, 13).

Two amendments to the bill of complaint were made, the first, on November 4, 1925, alleging that the charge pending against the plaintiffs is in five counts for conspiracy to violate the Anti-Trust Act and that the Colorado Court has held the said act to be constitutional (R. 13, 14), and the second amendment, also on November 4, 1925, alleging that the act was rendered unconstitutional by the subsequent passage of the co-operative marketing act exempting farmers from the

operation thereof, and adding a prayer that the defendant (appellant) be enjoined from attempting to forfeit the charters of the plaintiff companies.

On the fourth of November 1925, there were filed in the court below the affidavits of Clarence Frink (R. 15-19), Simon J. Heller (R. 20-22), A. T. McClintock (R. 22-25), H. Brown Cannon (R. 25-28), and Morris Robinson, setting forth matters of an evidentiary nature tending to sustain the allegations of the petition.

On the fourteenth day of November, 1925, the court entered an order for an interlocutory injunction (R. 32), declaring the Colorado Anti-Trust Act to be unconstitutional and enjoining the defendant from enforcing the said act against the plaintiffs and enjoining him "from taking any further action in the prosecution or trial of that certain criminal processing pending in the District Court, City and County of Denver, State of Colorado, being No. 28320, Div. VI of said Court, styled The People of the State of Colorado vs. H. Brown Cannon *et al.*, and being entitled "Information for conspiracy to violate Anti-Trust Laws."

On December 14, 1925, this decree was made permanent (R. 33).

The opinion of the court below is found on pages 37 to 50 of the Record.

From these two orders of the court below, the defendant, now the appellant, has taken this appeal (R. 34-37 and 50-53).

SPECIFICATION OF POINTS RELIED ON.

There are nine assignments of error (R. 35, 36) and six points designated as those upon which appellant intends to

rely (R. 50-51). Actually, the contentions of the appellant may be summarized into two contentions:

I. That the court below should not have interfered by injunction with the prosecution of a criminal case in the State Court of Colorado, which criminal case was pending at the time of the filing of the bill of complaint herein.

II. That the Colorado Anti-Trust Act is in fact constitutional.

The argument of this brief on these two points may be summarized as follows:

I. That the federal courts do not enjoin the further prosecution of pending criminal cases in state courts, because:

1. The statute prohibits it, and
2. It is contrary to the rules of equity, for
   a. Even in civil cases there is no such intervention.
   b. And in criminal cases there are additional reasons for the rule.

II. The Colorado Anti-Trust Law is constitutional.

1. The Colorado Anti-Trust Law does not deny the equal protection of the laws by exempting labor and agricultural products.
   a. Exemption of Labor.
   b. Exemption of Agricultural products.
   c. The case of Connolly v. Union Sewer Pipe Co.
   d. Public policy requires the exemption of co-operative marketing associations from anti-trust laws.

2. The provision of the Colorado Anti-Trust Law providing for the forfeiture of the charters, rights and franchises of a corporation violating it is not invalid under the due process clause of the Fourteenth Amendment.

3. The Colorado Anti-Trust Law does not violate the Fourteenth Amendment on the ground that it fails to establish an ascertainable standard of guilt.

   a. Cases distinguished.

BRIEF OF THE ARGUMENT

I.

THE INJUNCTION

Federal Courts do not enjoin the further prosecution of pending criminal cases in State courts, because

1. The Statute prohibits it.

   Section 720 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 581 (Sec. 265, Judicial Code, 36 St. At. L. 11627, Chap. 231, U. S. Comp. Stat. Supp. 1911, p. 236) is as follows:

   "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy."

2. It is contrary to the rules of equity for,

   a. Even in civil cases there is no such intervention.

   Essanay Film Manufacturing Co. vs. Kane, 258 U. S. 358

Hull vs. Burr, 234 U. S. 712

Mutual Reserve Fund Life Assn. v. Phelps, 190 U. S. 147

United States v. Parkhurst-Davis Merc. Co., 176 U. S. 317

Parcher v. Cuddy, 110 U. S. 742

Dial v. Reynolds, 96 U. S. 340

Haines v. Carpenter, 91 U. S. 254

Diggs v. Wolcott, 4 Cranch 179.

The rule announced in these cases applies only where the action in the state court is pending at the time of the institution of the suit in the federal court asking for an injunction. In the instant case, the proceeding in the Colorado court was pending and set for trial at the time the suit was instituted in the court below.

b. In criminal cases the rule is even more strict. This is for the reason that equity has always hesitated to interfere with criminal cases.

Story, Commentaries on Equity Jurisprudence, section 893.

Ex Parte Sawyer, 124 U. S. 200.

The rule that a federal court of equity will not interfere by injunction with criminal cases already pending in State Courts is well grounded in both reason and authority. Ex Parte Sawyer, *supra*; Harkrader vs. Wadley, 172 U. S. 148; Fitts v. McGee, 172 U. S. 516; Ex Parte Young, 209 U. S. 123, especially at p. 162.

The majority opinion of the court below (R. 47) relied, in granting the injunction against a pending criminal prosecution in a state court, on certain language of this court in Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, which is admittedly *obiter dicta* running contrary to the de-

cisions of this court cited above, as pointed out in the dissenting opinion of Symes, J. (R. 49) and also contrary to the later statements of this court in Ex Parte Young, *supra*.

Of course, it is not denied that the federal courts, in proper cases, in order to preserve the constitutional guarantees, may interfere by injunction with the threatened institution of criminal prosecutions, but even in such cases, it is with great hesitancy and only under extraordinary circumstances, that this jurisdiction is exercised.

Hygrade Provision Co. v. Sherman, 266 U. S. 497
Fenner v. Boykin, 70 L. Ed. 599, ...U. S. ....

II.

THE COLORADO ANTI TRUST LAW.

The Colorado Anti-Trust Law is found in Colorado Session Laws for 1913, Chapter 161, page 613 and in Sections 4036 to 4043 inclusive Compiled Laws of Colorado, 1921. The Act is printed in full in Appendix "A" of this brief.

This Act provides that a trust is a combination of capital, skill or acts by two or more persons for any or all of the following purposes:

First, to create or carry out restrictions in trade or commerce.

Second, to increase or reduce the price of merchandise, produce or commodities.

Third, to prevent competition in the manufacture, transportation, sale or purchase of merchandise and commodities.

Fourth, to fix any standard of figures whereby the price of any article or commodity is controlled or established.

Fifth, to enter into any contract by which they shall

agree not to sell, manufacture or transport any article or commodity below a common standard figure; or by which they shall agree in any manner to keep the price of such commodity at a fixed figure; or by which they shall settle the price of any article so as to preclude competition; or by which they shall agree to unite any interest they may have so that the price of a commodity may be effected.

It is provided that any domestic corporation violating this Act shall have its charter revoked. A foreign corporation violating the Act is denied the right to do business in the State. Contracts in violation of the Act are void.

This Act has been before the Supreme Court of Colorado for interpretation four different times, the cases being:

Burns v. Wray Co., 65 Colo. 425
Campbell v. People, 72 Colo. 213
Johnson v. People, 72 Colo. 218
Apostolos v. People, 73 Colo. 71.

In none of these cases did the Colorado Supreme Court directly consider the constitutionality of this Act. But, as said by Circuit Judge Lewis, in giving the opinion of the court below (R. 41):

> "We take these rulings of the Supreme Court (of Colorado) as an implied conclusion on its part that the Act was valid as the law of the State then stood."

The lower court held the Colorado Anti-Trust Law unconstitutional solely upon the ground that an exception from the operation of such law provided for in the Colorado Co-Operative Marketing Act of 1923 was a denial of the equal protection of the laws in violation of the Fourteenth Amendment and cited as authority for such ruling the case of Connally v. The Union Sewer Pipe Co., 184 U. S. 540.

1. THE COLORADO ANTI-TRUST LAW DOES NOT VIOLATE THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE FOURTEENTH AMENDMENT BY EXEMPTING LABOR AND AGRICULTURAL PRODUCTS.

a. EXEMPTION IN FAVOR OF LABOR.

The Colorado Anti-Trust Law provides, Section 1, that:

> "Labor, whether skilled or unskilled, is not a commodity within the meaning of this Act."

It is settled by the decisions of this court that an anti-trust statute is not unconstitutional as denying the equal protection of the laws because it exempts labor.

> International Harvester Co. v. Missouri, 234 U. S. 199 at 210.
> Duplex Co. v. Deering, 254 U. S. 443 at 469.

b. EXEMPTION OF AGRICULTURAL PRODUCTS.

The pertinent provisions of the Colorado Co-operative Marketing Law, Chapter 141, Session Laws, 1923, are printed in Appendix "B" of this brief. The Act states that its purpose is to promote, foster and encourage the intelligent and orderly marketing of agricultural products and to eliminate speculation and waste in the distribution of agricultural products and to stabilize the price of agricultural products, all by means of co-operative marketing associations. It provides the method in which these associations shall be organized and carefully limits the membership and power of such associations.

Section 22 of the Act provides in part:

> "Any provisions of law which are in conflict with

this Act shall be construed as not applying to the associations herein provided for."

Section 29 of the Act provides as follows:

"No association organized hereunder and complying with the terms hereof shall be termed to be a conspiracy or a combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or to fix prices arbitrarily, nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this Act be considered illegal as such or in unlawful restraint of trade or as a part of a conspiracy or combination to accomplish an improper or illegal purpose."

The constitutionality of this Act has been upheld by the Supreme Court of Colorado in the case of Rifle Potato Growers' Association v. Smith, 78 Colo. 171.

The contention of the plaintiffs is that the exemption in favor of agricultural products created by the Marketing Act denies them the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution.

It is a well-established rule that classifications made by State legislatures having a reasonable basis and not palpably arbitrary are to be upheld.

Gulf, Colo. & Santa Fe R. R. Co. v. Ellis, 165 U. S. 150.

Magoun v. Ill. Trust & Savings Bank, 170 U. S. 283.

American Sugar Refining Co. v. Louisiana, 179 U. S. 89.

Missouri, Kansas & Texas R. R. Co. v. May 194 U. S. 267.

International Harvester Co. v. Missouri, 234 U. S. 199.

The exemption in favor of agricultural products created by the Colorado Marketing Act is reasonable and does not violate the Fourteenth Amendment. This exemption is not absolute but applies only to Cooperative Marketing Associations organized under and complying with the terms of the Colorado Cooperative Marketing Act. A perusal of the Marketing Act dissipates any thought that it has for its fundamental purpose the accomplishment or promotion of a monopoly. Its dominant purpose is to promote the welfare of its members by stimulating cooperative effort.

The Supreme Court of Colorado has held that this Act does not unreasonably restrain trade. In Rifle Potato Growers v. Smith, *supra*, it was said, page 177:

> "This act and contract cannot be classed as in undue or unreasonable restraint of trade, and it has been uniformly so held in the various states where these contracts have been considered."

In the same case it was also held that the Marketing Act did not discriminate unreasonably, the Colorado Supreme Court holding, page 176:

> "We think that, unless the classification clearly appears to be unreasonable, we must yield to the judgment of the legislature upon that point, and we think it not clearly unreasonable to say that there are reasons for maintaining stability of the markets of agricultural products beyond like reasons in case of other products, and that we must, therefore, acquiesce in this classification. The legislature in such classifications must have a wide range of discretion."

Section 29 of the Marketing Act should be construed

as not forbidding marketing associations from lawfully carrying out their legitimate objects, or, in other words, that such organizations should not be held *per se* to be illegal combinations or conspiracies in restraint of trade; but that section should not be construed as exempting such an organization or its members from accountability where there is a departure from the normal and legitimate objects of the association and where there is in fact an actual combination or a conspiracy in restraint of trade. Such is the interpretation which has been placed upon Section 6 of the Clayton Act, 38 Stat. 730, by the Supreme Court of the United States in the case of Duplex Co. v. Deering 254 U. S. 443 at 469:

Section 6 of the Clayton Act provides as follows:

> "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

In construing this section, this court stated in Duplex Co. v. Deering, *Supra*, page 469:

> "As to Section 6, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in

the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws."

Section 29 was inserted in the Colorado Marketing Act merely to clarify a disputed point of law, namely, whether the mere existence and operation of Cooperative Marketing Associations was a violation of the anti-trust laws, and to allow the effective functioning of Cooperative Marketing Associations and labor organizations on one side and anti-trust laws on the other without conflict.

c. THE CASE OF CONNOLLY V. THE UNION SEWER PIPE CO. 184 U. S. 540.

The lower court held the Colorado Anti-Trust law unconstitutional because of the exemption in favor of agricultural products, on the authority of the case of Connolly v. The Union Sewer Pipe Co. 184 U. S. 540. That decision is not controlling here. The Connolly case held unconstitutional an anti-trust statute of Illinois which contained the following exemption:

"The provisions of this Act shall not apply to agricultural products or livestock while in the hands of the producer or raiser."

That exemption is absolute while the exemption in favor of agricultural products created by the Colorado Marketing Act is not absolute and cannot be used as a protection for associations which do not comply with the terms of the Marketing Act but seek to restrain trade.

Furthermore, the Connolly case, while it has never been reversed by the Supreme Court of the United States, has been modified by later decisions of this court. See

New York Central R. R. Co. v. White, 243 U. S. 188
Miller v. Wilson, 236 U. S. 373
International Harvester Co. v. Missouri, 234 U. S. 199.

The distinction between the Connolly case and cases involving an exemption in favor of agricultural products created by a Marketing Act has been recognized in at least six cases in which State Supreme Courts have upheld exemptions of the character contained in the Marketing Act as against the Connolly decision which was advanced by those attacking the constitutionality of such laws. These cases are:

Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal, 182 Wis. 571.
Potter v. Dark Tobacco Growers' Cooperative Assn., 201 Ky. 441.
List v. Burley Tobacco Growers Cooperative Assn., 114 Ohio State 361.
Dark Tobacco Growers Cooperative Assn. v. Dunn 150 Tenn. 614.
Kansas Wheat Growers Assn. v. Charlet, 118 Kans. 765.

Minnesota Wheat Growers Cooperative Marketing Assn., v. Huggins 162 Minn., 471.

d. PUBLIC POLICY REQUIRES THE EXEMPTION OF COOPERATIVE MARKETING ASSOCIATIONS FROM ANTI-TRUST LAWS.

Public policy requires an exemption of Cooperative Associations from anti-trust laws in favor of agricultural products. The earlier anti-trust legislation is being modified and certain well defined exemptions are being created. Since 1912 the United States Department of Agriculture has been encouraging and aiding in the formation of Cooperative Marketing Associations. Secretary of Agriculture Jardine in a recent address declared that cooperative marketing

> "is essential to the development of an independent prosperous agriculture and a prosperous agriculture is essential to the welfare of the nation."

Section 6 of the Clayton Act hereinbefore referred to is a clear indication of the policy of Congress in regard to Cooperative Marketing Associations, and the Capper-Volstead Act of February 18, 1922 and the act of July 2, 1926 creating a division of cooperative marketing in the Department of Agriculture further indicate the congressional trend. Cooperative marketing acts have been passed by more than three-fourths of the states of the union and these enactments have been upheld by the courts of last resort in at least fifteen of the states of the union. So far as we can discover in not a single case have any of these state laws been declared invalid. A partial list of the cases which have been decided is as follows:

Rifle Potato Growers v. Smith, 78 Colo. 171.
Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal, 182 Wis. 571.

Potter v. Dark Tobacco Growers' Cooperative Assn., 201 Ky. 441.

List v. Burley Tobacco Growers Cooperative Assn., 114 Ohio State 361.

Dark Tobacco Growers Cooperative Assn. v. Dunn, 150 Tenn. 614.

Kansas Wheat Growers Assn. v. Charlet, 118 Kans. 765.

Minnesota Wheat Growers Cooperative Marketing Assn. v. Huggins 162 Minn. 471.

Tobacco Growers Cooperative Assn. v. Jones, 185 N. C. 265.

Brown v. Stable Cotton Cooperative Assn., 132 Miss. 859.

Texas Farm Bureau Cotton Assn. v. Stovall, 113 Texas 273.

Oregon Growers Cooperative Assn. v. Lentz, 107 Ore. 561.

Washington Cranberry Growers Assn. v. Moore, 117 Wash. 430.

Anaheim Citrus Fruit Assn. v. Yoeman, 51 Cal. App. 759.

Ex Parte Baldwin County Producers Corp., 203 Ala. 345.

Castorland Milk and Cheese Co. v. Shantz, 179 N. Y. S. 131.

Tobacco Growers Cooperative Assn. v. Patterson, 187 N. C. 252.

Poultry Producers of Southern Cal. Inc. v. Barlow, 189 Cal. 278.

Nebr. Wheat Growers Assn. v. Norquest, 204 N. W. 798 (Neb.)

California Bean Growers Assn. v. Rindge Co. 248 Pac. 658 (Calif.)

The public policy thus declared by legislation and thus universally upheld by judicial pronouncement must be held to be sound and not in contravention of any constitutional limitations.

2. THE PROVISIONS OF THE COLORADO ANTI-TRUST LAW PROVIDING FOR THE FORFEITURE OF THE CHARTERS, RIGHTS AND FRANCHISES OF A CORPORATION VIOLATING IT DO NOT INVALIDATE IT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The argument of the plaintiffs below on this point is predicated on the assumption that under Sections 3 and 4 of the Colorado Anti-trust law the various corporations which are parties to this suit are liable to have their charters revoked. It is to be noted that no action has been taken which attempts to revoke the charter of any of these companies. The point raised thus concerns facts which may never arise and is not properly before the court.

It is to be remembered that a corporation is a creature of the law with no inherent powers. The powers of a corporation and the means of executing those powers are absolutely within the State's control, and if a corporation violates a rule of conduct laid down by the State it is answerable to the State for such actions.

It is well settled that a State has the power to impose such conditions as it pleases upon corporations seeking to do business within it, and a provision in an anti-trust law providing for the forfeiture of a corporation's charter because of a violation of the anti-trust law is not a violation of the Fourteenth Amendment.

> Waters Pierce Oil Co. v. Texas, 177 U. S. 28 at 43;
> Waters Pierce Oil Co. v. Texas 212 U. S. 86 at 111.

3. THE COLORADO ANTI TRUST LAW DOES NOT VIOLATE THE FOURTEENTH AMENDMENT ON THE GROUND THAT IT FAILS TO ESTABLISH AN ASCERTAINABLE STANDARD OF GUILT.

The argument that this law is unconstitutional because of a failure to definitely fix a standard of guilt is based upon the first proviso found in the last paragraph of Section 1 of the law, which is

> "Provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be marketed."

It is to be noted that the Colorado Anti Trust law defines and prohibits combinations which operate in restraint of trade and which in no way concern the subject of prices of commodities or the profits to be realized on the sale thereof. The Act was so construed by the Colorado Supreme Court in Campbell v. People, 72 Colo. 213. In that case the conviction was on a charge that the unlawful agreement between the defendants who constituted an association of master plumbers was that none but members in good standing of a named local union could be employed by the defendants. The court said:

> "We do not agree that the sole purpose of the act was to prevent a restriction in dealing in commodities but think that it was also to prevent the restriction of competition and the attainment of the control of a business, i. e. monopoly."

Many well-known methods can be resorted to by those in a combination to restrict or destroy competition and af-

fect prices and profits by indirection, such as the division of territory between them and other well-known methods; and it is to be noted that the information in this case charges a violation of the anti-trust law under each of the five definitions of a trust contained in the Colorado Anti-Trust Act.

A state statute is not unconstitutional because wanting in certainty when the provisions complained of as uncertain employ words or phrases having a well settled common law meaning notwithstanding an element of degree in the definition as to which estimates might differ.

Connally v. General Construction Company.....U. S.....70, Lawyers' Ed. 163-165.
Hygrade Prov. Co. v. Sherman, 266 U. S. 497.
Nash v. United States, 229 U. S. 373.

The proviso here complained of is, we contend, merely a legislative declaration of the rule of reason laid down by Chief Justice White in the Standard Oil Company case for the interpretation and application of the Sherman Anti-Trust Law. It is plain that combinations which do not come within this proviso would not be against public policy or in restraint of trade and hence would not be indictable either under the common law or under the Sherman Act, while combinations which do not come within this exception are illegal because in restraint of trade and against public policy.

Standard Oil Co. v. U. S., 221 U. S. 1 at 60-65.

The Colorado Legislature has merely attempted through this proviso to incorporate into the State Anti-Trust Law the standard laid down by the common law and the standard established by the United States Supreme Court to guide prosecutions under the Sherman Act. The Colorado Supreme Court has so interpreted this law.

Campbell v. People, 72 Colo. 213-216.

It is settled that an anti-trust law dependent upon such rule of reason can be the basis of a criminal prosecution.

Nash v. United States, 229 U. S. 373.
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 109.

In the Nash case *Supra*, this court considered the question as to whether or not there was any constitutional difficulty in the way of enforcing the criminal prosecutions of the Sherman Anti-Trust Act because of the alleged uncertainty of such provisions. In holding that there was no constitutional objection to the enforcement of the criminal provisions of this Act, the court said, page 376:

> "That thereupon it is said that the crime thus defined by statute contains in its definition an element of degree as to which estimates may differ with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men * * *
>
> "But apart from the common law as to restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here; he may incur the penalty of death."

a. CASES DISTINGUISHED

The case of the U. S. v. Cohen Grocery Co., 255 U. S. 81 wherein a section of the Food Control or Lever Act, 40 Stat. 276, was held unconstitutional because it failed to fix an ascertainable standard of guilt is not in point because

of the differences between the statute there considered and the anti-trust act. Indeed, the court itself in the opinion handed down in the Cohen Grocery Company case distinguished that case from the Nash case, the court saying:

> "But decided cases are referred to which it is insisted sustain the contrary view. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86; Nash v. United States, 229 U. S. 373; Fox v. Washington, 236 U. S. 273; Miller v. Strahl, 239 U. S. 426; Omaechevarria v. Idaho, 246 U. S. 343. We need not stop to review them, however, first, because their inappositeness is necessarily demonstrated when it is observed that if the contention as to their effect were true it would result, in view of the text of the statute, that no standard whatever was required, no information as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power, in the very teeth of the settled significance of the Fifth and Sixth Amendments and of other plainly applicable provisions of the Constitution; and second, because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded. Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them."

Likewise, the case of the International Harvester Company vs. Kentucky, 234 U. S. 216 is distinguishable. In that case the court recognizes and comments upon the distinction between the facts with which it was there concerned and

the facts in the Nash case, and on page 223 stated:

> "We regard this decision as consistent with Nash v. United States, 229 U. S. 373, 377, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust."

CONCLUSION

Summarizing—we contend that:

First. The court below should not have interfered by injunction with the prosecution of a criminal case in the State Courts of Colorado which criminal case was pending at the time of the filing of the complaint herein, because such interference by injunction with the criminal proceedings of the State Court is contrary both to the Federal Statutes and to the rules of equity.

Second. The exemption of the Colorado Anti-Trust Act in favor of labor is constitutional under the decisions of this court.

Third. The exemption from the operation of the anti-trust act in favor of agricultural products is reasonable and should be upheld.

Fourth. The decision of Connolly vs. Union Sewer Pipe Company is not controlling in this case.

Fifth. The Colorado Anti-Trust Law does not violate the due process clause of the Fourteenth Amendment by providing for the forfeiture of the corporate rights of those corporations which violate it.

Sixth. The Colorado Anti-Trust Law does, in fact, establish an ascertainable standard of guilt.

We, therefore, respectfully submit that the judgment of the lower court should be reversed with appropriate directions.

WILLIAM L. BOATRIGHT
PAUL M. SEGAL
A. L. BETKE
JEAN S. BREITENSTEIN
Solicitors for Appellant.

APPENDIX A

THE COLORADO ANTI-TRUST LAW (SESSION LAWS 1913 CHAPTER 161, PAGE 613—SECTIONS 4036 TO 4043, INCLUSIVE, COMPILED LAWS, 1921)

AN ACT

DEFINING AND PROHIBITING TRUSTS; PROVIDING PROCEDURE TO ENFORCE THE PROVISIONS OF THIS ACT, AND PENALTIES FOR VIOLATIONS OF THE PROVISIONS OF THIS ACT.

Be It Enacted by The General Assembly of the State of Colorado.

Section 1. A trust is a combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or by any two or more of them, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

Second. To increase or reduce the price of merchandise, produce or commodities.

Third. To prevent competition in the manufacturing, making, transportation, sale or purchase of merchandise, produce, ores, or commodities, or to prevent competition in aids of commerce.

Fourth. To fix any standard of figures, whereby the price to the public of any article or commodity of merchandise, produce or commerce intended for sale,

use or consumption in this State shall, in any manner, be controlled or established.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure; or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others so as to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or by which they shall agree to so pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected.

And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed; provided further that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or own any interest in any association, firm or corporation having as its ob-

ject or purpose the transportation, marketing or delivering of such commodities; and provided further that labor, whether skilled or unskilled, is not a commodity within the meaning of this act.

Section 2. It shall be lawful to enter into agreements or form associations or combinations, the purpose and effect of which shall be to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade.

Section 3. For a violation of any of the provisions of this act by any corporation, or by any of its officers or agents mentioned herein, it shall be the duty of the attorney general of this State, or district attorney of any district in which said violation may occur, or either of them upon his own motion to institute an action in any court of this State having jurisdiction thereof for the forfeiture of the charter, rights and franchise of such corporation, and the dissolution of its existence.

Section 4. Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises, or functions of a corporation in this State, violating any of the provisions of this act, is hereby denied the right and it shall be the duty of the Attorney General to enforce this provision by bringing proper proceedings by injunction or otherwise.

Section 5. Each and every person, company or corporation, the officers, agents or representatives thereof, violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to a fine of not more than one thousand dollars, or to imprisonment for not more than six months; and it shall be the duty of the Attorney

General of the State, or the district attorney of any district in the State, in which said violation shall occur, or either of them, to prosecute and enforce the provisions of this act.

Section 6. Any contract or agreement in violation of any of the provisions of this act shall be absolutely void; and when any civil action shall be commenced in any court of this State it shall be lawful to plead in defense thereof that the cause of action sued upon grew out of a contract or agreement in violation of the provisions of this act.

Section 7. That any person, firm, company or corporation that may be damaged by any such agreement, trust or combination described in Section 1 of this act, may sue for and recover in any court of competent jurisdiction in this State, of any person, company or corporation operating such trust or combination, such damages as may have been thereby sustained.

Section 8. In any proceedings pending in any court of record brought or prosecuted by the Attorney General, or any district attorney, for the violation of any of the provisions of this act, no person shall be excused from attending, testifying or producing books, papers, schedules, contracts, agreements or any other document, in obedience to the subpoena or under the order of such court, or any commissioner or referee appointed by said court to take testimony, or any notary public, or other person or officer authorized by the laws of this State to take depositions, when the orders made by such courts, or judge thereof, included a witness whose deposition is being taken before such notary public or other officer, on the ground or for the reason that the testimony or evidence required of him may tend to

criminate him or subject him to any penalty; but no individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, before any such court, person or officer.

Approved April 7th, 1913, at 9:03 A. M. o'clock.

APPENDIX B

THE COLORADO CO-OPERATIVE MARKETING LAW.

(Colorado Session Laws, 1923, Chapter 142, Page 420)

Section 1. (a) In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products and to provide for the organization and incorporation of co-operative marketing associations for the marketing of such products, this Act is passed.

Section 2. As used in this Act.

(a) The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products.

(b) The term "member" shall include actual members of associations without capital stock and holders of common stock in associations organized with capital stock.

(c) The term "association" means any corporation organized under this Act; and

(d) The term "person" shall include individuals, firms, partnerships, corporations and associations.

Associations organized hereunder shall be deemed "non-profit," inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.

(e) For the purposes of brevity and convenience this Act may be indexed, to and cited as "The Co-operative Marketing Act."

Section 3. Eleven (11) or more persons, a majority of whom are residents of this State, engaged in the production of agricultural products, may form a non-profit, co-operative association, with or without capital stock, under the provisions of this Act.

Section 4. An association may be organized to engage in the marketing or selling or in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning; packing, grading, storing, handling, shipping or utilization thereof or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein.

Section 5. Every group of persons contemplating the organization of an association under this Act is urged to communicate with the director of markets when said office shall have been established, who will inform them whatever a survey of the marketing conditions affecting the commodities proposed to be handled may indicate regarding probable success.

It is here recognized that agriculture is characterized by individual production in contrast to the group or factory

system that characterizes other forms of industrial production; and that the ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops; and that for this purpose, the farmers should secure special guidance and instructive data from the Governor.

Section 6. Each association incorporated under this Act shall have the following powers:

(a) To engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any agricultural products produced or delivered to it by its members, or the manufacturing or marketing of the by-products thereof; or any activity in connection with the purchase, hiring or use by its members of supplies, machinery or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. Any association in its option may limit itself in its articles of incorporation to the handling of products of its members only, or it may in its articles assume the right to handle the products of non-members, but, in such event, the association shall not handle for non-members a volume of products greater in the aggregate than the aggre-

gate of products handled by it for its own members.

(b) To borrow money without limitation as to amount of corporate indebtedness or liability; and to make advance payments and advances to members.

(c) To act as the agent or representative of any member or members in any of the above mentioned activities.

(d) To purchase or otherwise acquire; and to hold, own, and exercise all rights of ownership in; and to sell, transfer or pledge, or guarantee the payment of dividends or interest on, or the retirement or redemption of, shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the warehousing or handling or marketing of any of the products handled by the association.

(e) To establish reserves and to invest the funds thereof in bonds or in such other property as may be provided in the by-laws.

(f) To buy, hold and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conduct and operation of any of the business of the association, or incidental thereto.

(g) To establish, secure, own and develop patents, trade marks and copy rights.

(h) To do each and everything necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the subjects herein enumerated; or conductive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition to exercise and possess all powers, rights and privileges necessary or incidental to the purposes for which the association is organized or to the activities in

which it is engaged; and in addition, any other rights, powers and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this Act; and to do any such thing anywhere.

Section 7. (a) Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members, (or issue common stock to), only persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or any part of the crop raised on the leased premises.

(b) If a member of an association be other than a natural person, such members may be represented by any individual, associate, officer or manager or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations organized hereunder.

Section 8. Each association formed under this Act must prepare and file articles of incorporation, setting forth:

(a) The name of the association.

(b) The purposes for which it is formed.

(c) The place where its principal business will be transacted.

(d) The term for which it is to exist, not exceeding fifty (50) years.

(e) The number of directors thereof, which must be not less than five (5) and may be any number in excess thereof; the term of office of such directors; and the names and ad

dresses of those who are to serve as incorporating directors for the first term, and or until the election and qualification of their successors.

(f) If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and provision for the admission of new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision or paragraph of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or vote of three-fourths of the members.

(g) If organized with capital stock, the amount of such stock and the number of shares into which it is divided and the par value thereof.

The capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and definite extent of the preference and privileges granted to each.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgments of deeds and conveyances; and shall be filed in accordance with the provisions of the general corporation law of this State; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all

the courts of this State and other places as prima facie evidence of the facts contained therein and of the due incorporation of such associations. A certified copy of the articles of incorporation shall also be filed with the Director of Markets, etc.

Section 9. Amendments to articles of incorporation.

Section 10. By-laws.

Section 11. General and Special meetings.

Section 12. Directions—Election.

Section 13. Election of Officers.

Section 14. Officers, employees and agents to be bonded.

Section 15. When a member of an association established without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment on stock and membership fees. The association shall hold the stock as security for the payment of the note; but such retention as security shall not affect the member's right to vote.

No member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

No stockholder of a co-operative association shall own more than one-twentieth (1-20) of the common stock of the

association; and an association in its by-laws, may limit the amount of common stock which one member may own to any amount less than one-twentieth (1-20) of the common stock.

No member or stockholder shall be entitled to more than one vote, regardless of the number of shares of common stock owned by him, and cumulative voting shall not be allowed.

Any association organized with stock under this Act may issue preferred stock, with or without the right to vote. Such stock may be sold to any person, member or non-member, and may be redeemable or retireable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate. The by-laws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association; and such restrictions must be printed upon every certificate of stock subject thereto.

The association may, at any time, as specified in the by-laws, except when the debts of the association exceed fifty (50) per cent of the assets thereof, buy in or purchase its common stock at the book value thereof, as conclusively determined by the board of directors, and pay for it in cash within one (1) year thereafter.

Section 16. Removal of officer or director.

Section 17. Referendum.

Section 18. The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or speci-

fied commodities exclusively to or through the association, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide, among other things, that the association may sell or resell the products delivered by its members, with or without taking title thereto; and pay over to its members the re-sale price, after deducting all necessary selling, overhead and other costs and expenses, including interest or dividends on stock, not exceeding eight (8) per cent per annum, and reserves for retiring the stock, if any; and other proper reserves.

Section 19. (a) The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the members or stockholders to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

(b) In the event of any breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree a specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened

breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

(c) If any action upon such marketing agreement, it shall be conclusively presumed that a land owner or landlord or lessor is able to control the delivery of products produced on his land by tenants or others, where tenancy or possession or work on such land or the terms of whose tenancy or possession or labor thereon were created or changed after execution by the land owner or landlord or lessor, of such a marketing agreement; and in such actions, the foregoing remedies for non-delivery or breach shall lie and enforceable against such landowner, landlord or lessor.

Section 20. Purchasing business of other associations, persons, firms or corporations.

Section 21. Annual reports.

Section 22. Any provisions of law which are in conflict with this Act shall be construed as not applying to the associations herein provided for.

Any exemptions whatsoever under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its members, in the possession or under the control of the association.

Section 23. No person, firm, corporation or association, hereafter organized or hereafter applying to do business in this State as a co-operative marketing association for the sale of agricultural products, shall be entitled to use the work "co-operative" as part of its corporate or other business name or title, unless it has complied with the provisions of this Act.

Section 24. Interest in other corporations or associations.

Section 25. Contracts and agreements with other associations.

Section 26. Rights and remedies apply to similar associations of other states.

Section 27. Associations heretofore organized may adopt the provisions of this act.

Section 28. Any person or persons or any corporation whose officers or employes knowingly induce or attempt to induce any member or stockholder of an association organized hereunder or organized under similar statutes of other States with similar restrictions and rights and operating in this State under due authority, to break his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management or activity thereof, shall be guilty of a misdemeanor and be subject to a fine of not less than one hundred ($100.00) dollars and not more than one thousand ($1,000.00) dollars for each such offense; and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred ($500) dollars for each such offense.

Section 29. No association organized hereunder and complying with the terms hereof shall be deemed to be a conspiracy or a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or to fix prices arbitrarily nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this Act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose.

Section 30. If any section of this Act shall be declared unconstitutional for any reason, the remainder of this Act shall not be affected thereby.

Section 31. The provisions of the general corporation laws of this State and all powers and rights thereunder, shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this Act.

Approved March 30, 1923.

Respectfully submitted,

WILLIAM L. BOATRIGHT
PAUL M. SEGAL
A. L. BETKE
JEAN S. BREITENSTEIN
Solicitors for Appellant

SUBJECT INDEX

TABLE OF CASES

No. 31719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 304

FOSTER CLINE, as District Attorney for the City and County of Denver, State of Colorado,

Appellant,

vs.

FRINK DAIRY COMPANY, WINDSOR FARM DAIRY COMPANY, THE CLIMAX DAIRY COMPANY, H. BROWN CANNON, CLARENCE FRINK, A. T. McCLINTOCK AND MORRIS ROBINSON,

Appellees.

Appeal from the District Court of the United States for the District of Colorado.

BRIEF OF APPELLEES

Frink Dairy Company, Clarence Frink and A. T. McClintock.

INTRODUCTION.

The decision of the lower court is reported in 9 Fed. (2nd) 176. This case has been appealed under Section 266 of the Judicial Code. The motion to dismiss the bill was

denied November 14, 1925, (R. 32), and appellant having elected to stand on his motion and refusing to plead further, decree was entered December 14, 1925 (R. 33). The bill alleged that the Colorado Anti-Trust Act violated Article XIV of the Amendments to the Constitution of the United States (R. 6, 7). The rulings made by the lower court, which are the basis of this court's jurisdiction, are found in the opinion (R. 37-48).

SUPPLEMENTAL STATEMENT

In addition to appellant's statement of the allegations of the bill, it alleged (R. 7) that the Colorado Anti-Trust Act fails to fix any standard of criminality and fails to define what are reasonable profits; that the appellant had threatened (R. 10) to institute further prosecutions against appellees and (R. 11) to institute proceedings for the forfeiture of their charters, rights and franchises.

SUMMARY OF ARGUMENT

I. The Colorado Anti-Trust Act is Unconstitutional.

A. It is indefinite and furnishes no ascertainable standard of guilt.

1. The uncertainty of the Act.
2. Discussion of appellant's arguments.

a. The scope of the Act.
b. The rule of reason.
c. The Nash case.
d. The Waters-Pierce case.

B. It denies appellees the equal protection of the laws.

II. **A federal court will enjoin the enforcement of an unconstitutional state statute where property rights are invaded.**

a. The inadequacy of the remedy at law.

b. Appellant's cases distinguished.

c. Section 265 of the Judicial Code.

III. **Under the issues made by the pleadings, the right to enjoin the pending proceeding is not before the court.**

BRIEF

I.

THE COLORADO ANTI-TRUST ACT IS UNCONSTITUTIONAL

A.

THE COLORADO ANTI-TRUST ACT IS INDEFINITE AND FURNISHES NO ASCERTAINABLE STANDARD OF GUILT.

1. *The Uncertainty of the Act.*

The Colorado Anti-Trust Act, (Appendix A), after prohibiting certain combinations, provides (R. 4):

> "Provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed."

Stated in another way, a combination is lawful in Colorado if it makes a reasonable profit, but it violates the Anti-Trust Act if it makes an unreasonable profit. But the Act contains no definition of a "reasonable profit" and is silent as to what factors are to be included or eliminated in arriving at a reasonable profit. It necessarily delegates to a jury the determination of what is or is not a reasonable profit.

The information filed by appellant charged appellees with conspiring to fix and control the price of milk and milk products. Under this proviso it would be a complete defense to prove that only a reasonable profit was made. But how shall the jury determine this reasonable profit?

Shall it be 4% or 20%—either might be said to be within the bounds of reason, and the rate would doubtless vary in different industries and kinds of business. Certain of appellees were selling other commodities besides milk, such as ice, cold storage, butter, buttermilk powder (R. 23), ice cream and eggs (R. 29). Should the reasonable profit be based upon milk alone or upon all the commodities sold, and what portion of the entire overhead charges should be allocated to the milk business? If an apportionment were made, would it be considered fair or aribitrary? Should a reasonable profit depend upon the volume of business with the percentage based on the profit on each quart of milk sold, or upon the percentage the profits bear to the capital investment? Should the question whether the plant was run efficiently and economically, according to improved modern business methods, be taken into consideration? What allowances and reserves should be set aside for depreciation, bad debts, obsolescence and unforeseen contingencies? What amount should be allowed for purchase of new equipment, buildings and supplies? To what extent should the jury revise the expense account? Should differences in market conditions in different localities be considered? Should general trade cycles be considered? These and many other questions which readily come to mind are unanswered by this Act, yet it requires the jury to answer them. It would be impossible for appellees, in carrying on their various lines of business, to know in advance whether they were violating the law—whether they were "felons or patriots." As said by Mr. Justice Stone in United States v. Trenton Potteries Co., U. S. Sup. Ct. Feb. 21, 1927, 71 L. ed. 404, 406. "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow." He also there refers to "the necessity of minute inquiry whether a particular price is

reasonable or unreasonable as fixed," and the "burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." Appellees could only learn their fate after a protracted trial and the jury, probably unskilled in technical accounting, had reached a verdict upon what they conceived to be a reasonable profit.

It is well settled by decisions of this court that a criminal statute must define the crime with certainty and furnish an ascertainable standard of guilt to guide and inform the public what it is their duty to avoid, and if the statute fails to do this, and delegates to a jury the fixing of the test or standard, it is lacking in due process, unconstitutional and void. Connally v. General Construction Co., 269 U. S. 385, where an Oklahoma statute making it an offense to pay less than the "current rate of wages in the locality," was held void. In the opinion Mr. Justice Sutherland said, page 391: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process of law." U. S. v. Trenton Potteries Co., U. S. Sup. Ct. Feb. 1927, 71 L. ed. 494, 496; Yu Cong Eng v. Trinidad, 271 U. S. 500, 518; U. S. v. Cohen Gro. Co., 255 U. S. 81 and associated cases decided the same day in which the Lever Act, prohibiting the making of an "unjust or unreasonable rate or charge" for necessities, was held unconstitutional. International Harvester Co. v. Kentucky, 234 U. S. 216, and Collins v. Kentucky, 234 U. S. 634,

where a Kentucky statute prohibiting the charge of more than the "real value" for certain commodities was held unconstitutional. U. S. v. Penn. Ry., 242 U. S. 208, where an order of a Railroad Commission requiring tank cars to be provided upon "reasonable request and reasonable notice" for "normal" shipments, was said to furnish no criterion of application.

The following quotation from the case of U. S. v. Cohen Gro. Co., supra, at page 89, accurately describes the act under which appellees are being prosecuted:

> "It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. • • • • To attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

In United States v. Reese, 92 U. S. 214, this court said, at page 220: "If the Legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

In United States v. Brewer, 139 U. S. 278, 288, this court said: "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

In Tozer v. United States, 52 Fed. 917, the Interstate Commerce Act prohibiting "undue preferences" was held too indefinite, and Justice Brewer at page 919 said:

"But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of Railway Co. v. Dey, 35 Fed. 866, 876, I had occasion to discuss this matter, and I quote therefrom as follows:

'Now, the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In Dwar. St. 625, it is laid down "that it is impossible to dissent from the doctrine of Lord Coke that the acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned." * * * In this the author quotes the law of the Chinese Penal Code, which reads as follows: 'whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows, and when the impropriety is of a serious nature, with eighty blows.'

> **There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate.' "**

In Louisville and Nashville Ry. Co. v. Railroad Commission, 19 Fed. 679, a Tennessee statute prohibiting the charging of more than "just and reasonable compensation" was held void. In Railway Co. v. Dey, 35 Fed. 866, an act prohibiting the charging of "more than a fair and reasonable rate of tolls" was held unconstitutional. In Louisville & Nashville Ry. Co. v. Commonwealth, 99 Ky. 132, a Kentucky statute prohibiting the charging of more than a "just and reasonable rate" was held too indefinite to be enforced. In Hayes v. the State, 11 Ga. App. 371, 75 S. E. 523, a Georgia statute prohibiting a speed greater than is reasonable, was held void for uncertainty.

2. *Discussion of Appellant's Arguments.*

(a) The scope of the Act.

Appellant at page 20 of his brief points out that the Colorado Anti-Trust Act prohibits combinations which do not deal with the subject of prices or commodities or the profits to be realized on the sale thereof. This was commented upon in the decision of the lower court (R. 41), but even though true, this in no way remedies the uncertainty of the statute as applied to appellees. By the admitted facts in the bill, (R. 13), they are charged with price fixing in their occupation of selling milk to the public, which of necessity deals with prices and profits to be made therefrom. It was, therefore, necessary for the jury to determine whether they were making an unreasonable profit, and it is no answer to say that prosecutions might be instituted under the Act against others which would not involve such a question.

Appellant points out at page 10 of his brief that the Colorado Anti-Trust Act has been before the Colorado Supreme Court four times and admits that in none of the cases was the constitutionality of the Act raised or discussed. The fact that the court upheld convictions under the Act cannot therefore give rise to any inference that the Act is constitutional because that question never has been in issue. A decision is only authority for what it decides and not for what it might have decided. As this court has held, the effect of a decision is to be determined by the issues made and submitted and what the court intended to decide and accomplish. Oklahoma v. Texas, United States 71 L. ed. 1, 10; Vicksburg v. Henson, 231 U. S. 259, 273.

(b) The Rule of Reason.

Appellant in his brief, pages 21-24, claims that the Colorado Anti-Trust Act merely adopts the common law as to restraint of trade, and the "rule of reason" as stated in Standard Oil Co. v. United States, 221 U. S. 1, which he claims is a standard for prosecutions under the Sherman Act, and that the Colorado Supreme Court has so construed the Anti-Trust Act in Campbell v. People, 72 Colo. 213, 216. From this premise he argues that the Colorado Anti-Trust Act is valid. In support of this contention he cites Nash v. United States, 229 U. S. 373, in which the Sherman Act was upheld on its criminal side, and Waters-Pierce Oil Co., v. Texas, 212 U. S. 86, where a Texas Anti-Trust Act was upheld in a criminal prosecution. But his premise is wrong for three reasons.

In the first place, the Colorado Supreme Court has not given the Anti-Trust Act such a construction, and has not applied the "rule of reason." The Campbell case, supra, merely held that the court must determine whether the combination charged in the indictment was within the reason

and intent of the statute; and in Atkinson v. Colo. Wheat Growers Assn., 77 Colo. 559, the same judge answered the contention, that the combination in question was lawful unless unreasonable, by saying, page 561: "The claim of reasonableness cannot control us." In United States v. Trenton Potteries Co., U. S. Sup. Ct. 71 L. ed. 404, 407, this court cited the case of Johnson v. People, 72 Colo. 218 (under the same act), to the effect that the reasonableness of price levels established is not given consideration.

In the second place, the Colorado Anti-Trust Act does not apply any standard of criminality known to the common law. On the contrary, a new test or standard is set up which was unknown to the common law. There are no decisions furnishing any standard or test to determine what is a reasonable profit. It is one thing to determine whether a given course of action constitutes a reasonable restraint of trade, while it is quite another thing to determine whether or not a reasonable profit has been made.

In the third place, if there ever were any doubt upon the question, the recent decision of this court in United States v. Trenton Potteries Co., 71 L. ed. 404, has made it clear that the "rule of reason" has no application to price fixing agreements in prosecutions under the Sherman Act. There this court held that the trial judge correctly withdrew from the jury the consideration of the reasonableness of the price fixing agreements. And in so doing the court points out as a reason for its decision, the difficulties and uncertainties which arise in attempting to determine whether or not a reasonable price has been charged, referring to "so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."

(c) The Nash Case.

The Nash case, 229 U. S. 373, cited by appellant, dealt with unfair trade practices and not with the problem of reasonable prices, and upheld the Sherman Act because it codified the common law offenses of engrossing, monopoly and restraint of trade, thereby furnishing an ascertainable standard of guilt for that kind of restraint of trade. Mr. Justice Holmes in that case referred to "the common law as to restraint of trade thus taken up by the statute," and in the later case of International Harvester Co. v. Kentucky, 234 U. S. 216, 223, in distinguishing the Nash case, he refers to the "great body of precedents on the civil side coupled with familiar practice." The same idea was expressed by Chief Justice White in United States v. Cohen Gro. Co., 255 U. S. 81, where, in discussing the Nash and Waters-Pierce Oil cases, he said: "For reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." And in Connally v. General Construction Co., 269 U. S. 385, 391, Mr. Justice Sutherland, in citing the Nash case, refers to "words or phrases having a technical or other special meaning * * * or a well settled common law meaning." There are no cases giving the words "reasonable profit" a "technical or other special meaning" or a "well settled common law meaning"; nor is there a "great body of precedents" nor "familiar practice" to guide the jury in determining what is a reasonable profit.

(d) The Waters-Pierce Case.

The Waters-Pierce Oil Company case, 212 U. S. 86, cited by appellant, is clearly in the same class as the Nash case, and as clearly distinguishable. The Texas Act contained no provision as to reasonableness. This court merely approved an instruction that the Act would be violated if

the activities of the defendants were reasonably calculated to come within its prohibitions. The Tozer case, 52 Fed. 917, and the Dey case, 35 Fed. 866, and The Louisville & Nashville Co. v. Ky., 99 Ky. 132 were there discussed by Mr. Justice Day, and he called attention to the fact that in all of them the acts were held invalid because "it rests with the jury to say whether a rate is reasonable and makes guilt depend not upon standards fixed by law," while, p. 109, "the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable as do the statutes condemned in the cases cited."

In Hygrade Provision Co. v. Sherman, 266 U. S. 497, cited by appellant, Mr. Justice Sutherland, at p. 502, points out that the term "kosher" "has a meaning well enough defined to enable one engaged in the trade to correctly apply it." The Hebrews have so applied it for centuries.

All of the cases cited by appellant are, therefore, entirely consistent with the principle for which we contend—all require that the Act shall furnish a definite test or standard of criminality which the Colorado Anti-Trust Act fails to do.

B.

THE COLORADO ANTI-TRUST ACT DENIES APPELLEES THE EQUAL PROTECTION OF THE LAWS.

The Colorado Anti-Trust Act (Appendix A), passed in 1913, contains prohibitions typical of such legislation. It declares to be against public policy, unlawful and void, a combination of two or more persons, corporations, or associations to create or carry out restrictions in trade or commerce, to increase or reduce the price of merchandise,

produce or commodities; to prevent competition in the manufacturing, making, transportation, sale or purchase of merchandise, produce or commodities; to fix any standard of figures whereby the price to the public of any article, commodity or product intended for sale or consumption in the state shall be in any manner controlled or established; to enter into any contract by which the parties shall bind themselves not to sell, manufacture or dispose of any article of trade, merchandise, commerce or consumption below a common standard figure or to keep the price at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity between themselves or themselves and others so as to preclude a free and unrestricted competition, or to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any article or commodity so that its price may in any manner be affected.

The Colorado Co-Operative Marketing Act (Appendix B), passed in 1923, exempts certain organizations from the operation of the Anti-Trust Act. It provides for the incorporation of co-operative associations to engage in the marketing or selling of agricultural products of its members. Agricultural products are defined to include horticultural, viticultural, forestry, dairy, livestock, poultry, bee and any farm products. Such associations are given power to engage in any activities in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, gathering, storing, handling or utilization of any agricultural products produced or delivered to it by its members or any activity in connection with the purchasing, hiring or use by its members of supplies, machinery or equipment, or in the financing of any such activities. Such an association may act as agent of its members in such activities and do everything neces-

sary or proper for the accomplishing of any of the purposes; may admit as members only persons engaged in the production of agricultural products to be handled by or through the association; may become a member of any other association organized under the law; may enter into marketing contracts between the association and its members requiring the members to sell for a period not over ten years, all or any specific part of their agricultural products or commodities exclusively to or through the association or any facilities to be created by the association. The by-laws or the marketing contract may fix specific sums as liquidated damages to be paid by a member to the association upon breach of any provision of the marketing contract regarding the sale or delivery or withholding of products. One association may organize, form, operate, own, control or have interest in any other such association, and any two or more associations may unite in using or may separately use the same personnel, methods, means and agencies for carrying on and conducting their business. Any law which is in conflict with the Act shall be construed as not applying to the associations provided for, and no association engaged under the Act (Section 29)

> "shall be deemed to be a conspiracy or a combination in restraint of trade or an illegal monopoly or an attempt to lessen competition or to fix prices arbitrarily, nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose."

The Supreme Court of Colorado in Rifle Potato Grow-

ers Co-operative Assn. v. Smith, 78 Colo. 171, has held that the Co-operative Marketing Act controls or amends the Anti-Trust Act, saying at page 174, "It is objected that the contract is in restraint of trade and so void under the Colorado Anti-Trust law (C. L. 1921, Secs. 4036-43). But the Act of 1923, being the later act, controls the earlier." In Colorado Wheat Growers Association v. Thede, 253 Pac. 30, decided February 21st, 1927, the Colorado Supreme Court held that the Co-operative Marketing Act declared "a new public policy of the state" for any associations which comply with its terms. The Colorado Co-operative Marketing Act, therefore, as construed by the Colorado Supreme Court, has made an exception to the prohibitions of the Colorado Anti Trust Act which permits marketing associations to combine to market or sell agricultural products. This privilege is denied to all other persons or associations engaged in business, trade or commerce in the State of Colorado.

A huge monopoly for marketing and selling food, a necessity of life, using any or all of the well known means of destroying trade and competition, raising prices, limiting production or engaging in unfair or ruthless trade practices (the Act imposes no restrictions whatever), would be legalized and given free rein, while all others engaged in trade or commerce including those dealing in other necessities, such as fuel and clothing, would at once be deemed criminals if they followed the same course.

As appellees are not, and could not be, members of such associations (Section 7), they are being prosecuted under a statute which denies them the equal protection of the laws. This court has so held in a case practically identical with the facts of the case at bar. In Connolly v. Union Sewer Pipe Company, 184 U. S. 540, this court held unconstitutional an Illinois Anti Trust Act practically in the same

terms as the Colorado Act, because it violated the Fourteenth Amendment to the Constitution by denying certain persons the equal protection of the laws. Both the Illinois Act and the Colorado Act contain the same general prohibitions, and each exempted agricultural producers from its terms. The Illinois Act by its terms did not apply "to agricultural products nor livestock while in the hands of the producer or raiser", and the Colorado Act does not apply to associations marketing or selling "agricultural products", which are defined to include, amongst other things, livestock and farm products. The reasoning and illustration of Mr. Justice Harlan in the Connolly case are therefore peculiarly applicable here.

Referring to the Illinois Act, at page 556, Mr. Justice Harlan enumerated the ways in which agriculturalists and livestock raisers might combine and then said:

> "All this, so far as the statute is concerned, may be done by agriculturalists or livestock raisers in Illinois without subjecting them to the fine imposed by the statute. But exactly the same thing, if done by two or more persons, firms, corporations or associations of persons who shall have combined their capital, skill or acts in respect of their property, merchandise, or commodities held for sale or exchange, is made by the statute a public offense."

The same thing can be said of agriculturalists and livestock raisers in the State of Colorado under the Colorado Anti-Trust Act. As Judge Lewis stated in the decision of the lower court in this case (R. 43):

> "Nothing can be plainer than that these combinations authorized through the formation of the associations as provided for in the act would in

fact be combinations in restraint of trade and an attempt to lessen competition in the marketing of agricultural products. A declaration that they should not be so considered is as futile as a statement that white is black."

And at page 563, Mr. Justice Harlan said in the Connolly case:

"In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. * * * It may be observed that if combinations of capital, skill, or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and livestock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and livestock raisers, may make combinations of that character in reference to their

> grain or livestock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws?"

And at page 564 Mr. Justice Harlan summed up the decision by saying:

> "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The holding in the Connolly case has been repeatedly approved in subsequent decisions of this court. In Cox v. Texas, 202 U. S. 446, 450, Mr. Justice Holmes in discussing the Connolly case, said:

> "Farmers and stock raisers are classes naturally existing in the community, carrying on distinct callings and not likely to be engaged in anything else. Hence, although farmers and stock-raisers equally with others were prohibited from forming trusts for other purposes, to permit them

to form trusts in their regular business was practically and in fact to discriminate between two classes and others."

In Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, 257, Mr. Justice Peckham referred to the Connolly case in the following language:

> "The statute did not apply to agricultural products or livestock while in the hands of the producer or raiser. It was held that this exemption rendered the statute void, as denying to persons within the jurisdiction of the state the equal protection of the laws. The statute was held to create a classification of an arbitrary nature, applicable to large numbers of people, and yet not based upon any reasonable ground. • • • no valid reason could be given why, if one were included, the other should be exempted. The same reasons apply to all classes, and should have led to the same results with regard to all."

In International Harvester Co. v. Missouri, 234 U. S. 199, 215, Mr. Justice McKenna, after holding that that case did not come within the ruling in the Connolly case, said:

> "If it did, we should of course apply that ruling here."

The Connolly case has also been cited with approval by this court many times, including, amongst others, the following: Otis v. Gassman, 187 U. S. 606, 610; Billings v. Illinois, 188 U. S. 97, 102; Missouri v. Dockery, 191 U. S. 165, 170; Dobbins v. Los Angeles, 195 U. S. 223, 236; Cook v. Marshall Co., 196 U. S. 261, 274; Halter v. Nebraska,

205 U. S. 34, 44; Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 260; Singer Sewing Machine Co. v. Brickell, 233 U. S. 305, 315; Truax v. Corrigan, 257 U. S. 312, 335; Radice v. People of the State of New York, 264 U. S. 292, 296.

A careful examination of the decisions of this court bears out the statement made by Judge Anderson, in United States v. Armstrong, 265 Fed. 683, at 692, in citing the Connolly case: "No case has been called to my attention wherein the doctrine here laid down upon the question as to what is arbitrary classification has been modified."

The Connolly case has also been cited with approval by other courts where similar cases of classification had to be decided. See Brown v. Jacobs Pharmacy, 115 Ga. 429, 41 S. E. 553; State v. Cudahy Packing Co., 82 Pac. 833, 33 Mont. 179; State v. Waters-Pierce Oil Co., 67 S. W. 1057, where the Georgia, Montana and Texas Anti-Trust Acts with the same exemptions were held invalid. United States v. Armstrong, 265 Fed. 683, and United States v. Yount, 267 Fed. 861, where the Lever Act, which exempts farmers and co-operative associations of farmers, was held unconstitutional.

We submit that upon both reason and authority the Colorado Anti-Trust Act denies to appellees the equal protection of the laws, and fails to furnish an ascertainable standard of guilt.

II.

A FEDERAL COURT WILL ENJOIN THE ENFORCEMENT OF AN UNCONSTITUTIONAL STATE STATUTE WHERE PROPERTY RIGHTS ARE INVADED.

a. The inadequacy of the remedy at law.

We submit that the Colorado Anti-Trust Act is unconstitutional. The attempted enforcement of this act against appellees was destroying and seriously imperiling their existence and their valuable property rights.

The allegations of the bill are admitted by the motion to dismiss. They establish that each of the corporations involved had large property investments. (Frink Dairy Company over $125,000 (R. 16); Windsor Farm Dairy Company over $100,000 (R. 27); Climax Dairy Company over $100,000 (R. 29); and Beatrice Creamery Company over $200,000 (R. 23).) Each company had been in business for many years, had gained thousands of customers, and had built up a large and well established trade and had developed a reputation for fair dealing and a good will of great value (R. 3, 17, 23, 26, 29). The attempted enforcement of this Anti-Trust Act against appellees caused each of them to be held up to public contempt and ridicule, injured their good names, alienated their customers, and seriously injured their business and good will, all to their irreparable damage (R. 14, 17, 18, 23, 26, 29). The newspapers held appellees up to public condemnation, contempt and ridicule because of the activities of appellant (R. 39). Because of the prosecution by appellant, the gross sales of one of the appellee companies in the month of the prosecution were over $6,000 less than the preceding month, and the business was carried on at a loss of over $2,500 for

that month (R. 17). The very existence of the different companies was threatened (R. 17, 23, 26, 29). Appellant was at the time summoning witnesses before the Grand Jury which was then in session, questioning them about the business of appellees, and threatening to institute further prosecutions, and attempting to get further indictments against appellees (R. 10). Last and most of all, appellant stated that it was his purpose and intention to institute proceedings to forfeit the charters, rights and franchises of appellees (R. 11, 16, 23, 26, 29), which he was authorized and directed under the terms of the act to do (R. 5). He was conducting a campaign by criminal prosecutions well calculated to destroy the business and the property of the appellees—all on the basis of an unconstitutional and void statute. The situation was exceptional and extraordinary.

The facts demanded extraordinary relief. Appellees had no adequate remedy at law, in the state courts of Colorado. The trial judge before whom the prosecution was pending had denied the motions to quash and refused further hearings requested by appellees to present authorities as to the unconstitutionality of the act (R. 20). Appellees, therefore, faced a long and expensive trial to a jury in the state court; if found guilty, then the preparation of a voluminous and costly record for the Supreme Court of Colorado; if unsuccessful there, then the further expense and delay of an appeal to this court. If found guilty, Sections 3 and 4 of the Act (R. 5) provided that the charters, rights and franchises of appellees should be forfeited and the corporations dissolved. By Section 6 of the Act (R. 6) their contracts would be absolutely void and the violation of the Act would be a defense in any suit they might bring to protect their rights or recover from their debtors. And by Section 7 of the Act (R. 6) they could be sued for damages.

and the finding of the jury would be used to establish such a cause of action. The decision of the lower court (R. 46) aptly describes the predicament of appellees:

> "The pleadings here and affidavits in support disclose that the State District Judge overruled motions to quash the information, declined to hear further argument from defendant's counsel in that case on the unconstitutionality of the State Anti-Trust Act, and has set that case down for trial at an early date. Under the State practice defendants in a criminal case cannot be heard in the State Supreme Court until after conviction, and the removal of their case to that court after the happening of that event, and putting it in condition to be finally heard there, requires time, frequently extended by unexpected delays. We are further informed by the proof that the record in that case will necessarily be voluminous. The four corporate defendants are jointly charged; their books and records will become competent proof in arriving at the question as to what are reasonable prices and profits for their products, which will involve a full investigation of the business of each company and require expert testimony. Such a record cannot be put in shape for the appellate court until after the lapse of many months. In the meantime the Act prohibits them from transacting any business in the State of Colorado. A verdict of guilty will be conclusive proof that they have violated the State Anti-Trust Act. It will also be conclusive proof in a suit to forfeit their rights and franchises and dissolve them, and a good defense in actions they may bring against their debtors. Under the charges

made in the bill it therefore seems clear that further prosecution of the pending information is but a step in the invasion of their property rights, and if continued those rights will be wholly destroyed under an invalid law."

The remedy at law was wholly inadequate to protect the property rights involved. It was a remedy which could not be availed of on the law side of the Federal Court and therefore was an occasion requiring the assistance of a Federal Court of Equity. Risty v. Sioux Falls, 270 U. S. 378; Terrace v. Thompson, 263 U. S. 197, 214.

This court has repeatedly decided that equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments when necessary to safeguard the rights of property. Tyson Bros. v. Banton, 71 L. ed. 483; Packard v. Banton, 264 U. S. 140; Terrace v. Thompson, 263 U. S. 197; Truax v. Raich, 239 U. S. 33; Philadelphia v. Stimson, 223 U. S. 605; Ex Parte Young, 209 U. S. 123; Dobbins v. Los Angeles, 195 U. S. 223; Davis & Farnum v. Los Angeles, 189 U. S. 207; Reagan v. Farmers Loan & Trust Co., 154 U. S. 362. The basic reason for the relief given in all of these cases was that property rights were being destroyed or threatened, and there was no adequate remedy in the State court to protect these property rights.

Appellees found themselves in a more precarious situation than that described by Mr. Justice Holmes in Oklahoma Natural Gas. Co. v. Russell, 261 U. S. 290, 293: "They are suffering daily from confiscation under the rate to which they are now limited. They have done all that they can under the State law to get relief and cannot get it. If the Supreme Court of the State hereafter shall change the rate even nunc pro tunc, the plaintiffs will have no adequate remedy for what they have lost before the court shall have

acted. * * * *Rules of comity or convenience must give way to constitutional rights*". (Italics ours.)

Appellant admits at page 9 of his brief that the Federal Court may enjoin threatened prosecutions but he argues that they can give no relief where a prosecution is pending in the State court. This distinction is unsound and is not borne out by the decisions of this court. In Davis & Farnum v. Los Angeles, 189 U. S. 207, arrests had been made under an invalid ordinance, and in answering the contention made by appellant here, Mr. Justice Brown said, at page 218:

> "*It would seem that if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceeding.* Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551, 558." (Italics ours.)

In the Springhead Spinning Company case there cited with approval, the Vice-Chancellor at page 558 says: "The jurisdiction of this court is to protect property and it will interfere to stay any proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property or to make it less valuable for use or occupation." And in Dobbins v. Los Angeles, 195 U. S. 223, arrests had been made under an invalid ordinance and the plaintiff filed a bill to enjoin the further prosecution in the State courts. This court held that the demurrer to the bill should have been overruled, stating at page 241:

> "*It is also urged by the defendants in error that a court of equity will not enjoin prosecution of*

a criminal case; but, as we have seen, the plaintiff in error in this case had acquired property rights, which, by the enforcement of the ordinance in question, would be destroyed and rendered worthless. If the allegations of the bill be taken as true, she had the right to proceed with the prosecution of the work without interference by the city authorities in the form of arrest and prosecution of those in her employ. *It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity.* Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207-218, and cases therein cited."

These decisions have been repeatedly cited with approval by this court. Packard v. Banton, 264 U. S. 140; Terrace v. Thompson, 263 U. S. 197; Truax v. Raich, 239 U. S. 33; Philadelphia v. Stimson, 223 U. S. 605.

Appellant cites no case, and there is none, where this court has held that such relief could not be given where property rights were being invaded and a prosecution was pending under an unconstitutional law. As the trial court well said (R. 47, 48):

"In most of these cases the legislation under consideration was sustained as valid, the prosecutions were only threatened, not pending, and there was no occasion to determine the point now in mind, it was not passed on. Where a criminal prosecution results directly in the invasion and destruction of property rights, we do not doubt that it is within the power and duty of a court of equity

> to enjoin the administrative officer who has charge of the prosecution if there be no valid law on which the accusation rests. The claimed difference, under those conditions, between pending and threatened cases is, in our judgment, without substance. We venture to say, on the authority of the Davis & Farnum case, that it can make no difference, on the question of jurisdiction when prosecution is begun under an invalid law, whether before or after a bill is exhibited, if there be an unlawful invasion by virtue thereof of property rights."

On principle, the pendency of a suit in the state court should not be, and is not, the determining factor. The fundamental inquiry to be made is whether or not property rights are being invaded and whether the remedy in the state court is adequate. Property rights are as likely to be destroyed, and in most instances more so, where a suit is pending than where it is merely threatened. This was the case of appellees, as the record shows that after the prosecution was started their business was rapidly being dissipated and destroyed. The appellant as District Attorney would, under the terms of the act, if a verdict of guilty was obtained, proceed to forfeit the charters of appellees. The right of the Federal Court to grant relief should not depend upon a race between the prosecuting officer and the accused to see who can first get into court.

b. Appellant's cases distinguished.

In none of the cases cited by appellant in his brief, pages 7-9, were the facts at all similar to those of the case at bar. Under subdivision (2) on page 7 he cites numerous civil cases which, in their very nature, could not be applicable to a criminal prosecution, and in none of them

was there an unconstitutional statute involved, and in none of them were property rights being invaded. In Essanay Film Mfg. Co. v. Kane, 258 U. S. 358, cited by appellant, Mr. Justice Pitney, at page 362, points out that the case "presented no exceptional feature." A suit for damages had been brought against an Illinois corporation in New Jersey, and the defendant had allowed the case to go by default. The defendant there clearly had an adequate remedy by defending the suit and appealing to the higher court. Such facts presented no exceptional feature requiring equitable relief. In Hull v. Burr, 234 U. S. 712, cited by appellant, the court points out at page 723 that Section 265 was not intended to limit the powers of the Federal Court to enforce its authority in cases within its proper jurisdiction. In Parcher v. Cuddy, 110 U. S. 472, Chief Justice Waite recognizes that an injunction may be granted where the reasons are imperative.

The criminal cases cited by appellant in subdivision b, page 8 of his brief, are in accord with our position. In Fenner v. Boykin, ... U. S. ..... 70 L. ed. 559, cited by appellant, there was no unconstitutional act involved and there was no necessity for the relief asked. The court there recognized that relief would be granted in "extraordinary circumstances where the danger of irreparable loss is both great and immediate" and where the remedy in the state courts is inadequate. In in re Sawyer, 124 U. S. 200, a city officer charged with malfeasance in office sought to enjoin the mayor from removing him. No suit was pending. There was no question of an unconstitutional act involved, but the court at pages 213 and 217 is careful to point out that the jurisdiction to restrain the action of the state court rests upon injury to property, whether actual or prospective, and the inference is clear that where property rights are involved, that the court will

give relief. Harkrader v. Wadley, 172 U. S. 148, cited by appellant, was a habeas corpus case. Mr. Justice Shiras points out, at pages 163, 164 and 167, that the validity and constitutionality of the law in question was not assailed. In Fitts v. McGhee, 172 U. S. 516, cited by appellant, no prior suit was pending, and the court held that it would not give relief as the suit would be in effect against the state; but this case has in effect been overruled by the later authorities which hold that such a suit is not against the state. Appellant also cites Story, Commentaries on Equity Jurisprudence. Section 1217 of the 14th edition is as follows: "Courts of equity will issue the writ of injunction to restrain the threatened injury to property rights, but if it appears that the criminal act does not affect property rights, the injunction will not issue."

Ex Parte Young, 209 U. S. 123, 162, is cited by appellant. Here an injunction was *granted* restraining the Attorney General of Minnesota from proceeding under an unconstitutional law. The language at page 162, relied upon by counsel, is at best, dictum as there was no pending suit. In addition, neither of the two following cases cited by the court in support of this dictum, support it. Taylor v. Taintor, 16 Wall. 366, 370, was not a case of a prior suit where an unconstitutional statute was involved. It merely states the well recognized principle that once jurisdiction attaches, that jurisdiction continues until final relief is given. We have already shown that Harkrader v. Wadley, the other case cited to this dictum, is no authority for such contention. This dictum is entirely inconsistent with the decisions in Davis & Farnum v. Los Angeles, and Dobbins v. Los Angeles, above referred to.

c. Section 265 of the Judicial Code.

Appellant says that Section 265 of the Judicial Code prohibits the granting relief where a suit is pending. This Section makes no such distinction. Its prohibition is against staying "proceedings in any court of a state" and it is not further qualified by the words "pending" or "threatened." The phrase "proceedings in any court of a State" within the meaning of this Section, covers "proceedings" that are threatened and about to be brought in a court of a State, as well as "proceedings" pending in any court of a State. Both are "proceedings" in any court of a State. If this section were literally applied, no injunction would ever issue out of a federal court to restrain a proceeding in a state court, whether threatened or pending. But it is not and never has been literally applied. There are many authorities cited above where this court has upheld the staying of threatened prosecutions. The reason for this is found in the fact that Section 265 is merely a statutory rule of comity and has not been literally enforced, and where necessity has required in many instances, it has given way to the application of injunctive relief by the federal courts. As said in Wells Fargo v. Taylor, 254 U. S. 175, 183:

> "It is intended to give effect to a familiar rule of comity and, like that rule, is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state court and is salutary, but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which, of course, is not contemplated."

In Smith v. Apple, 264 U. S. 274, this court held that

Section 265 is not jurisdictional but merely a limitation on the equity powers of the federal court. In the following instances the federal courts have found it necessary to act and this section has not prevented the granting of relief. In Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, it was held not to apply where a case has been properly removed from a state court to a federal court. The federal court will enjoin further proceedings in the state court; otherwise the right of removal would be an empty form. In actions in rem if the federal court first acquires jurisdiction, it will enjoin a later state court proceeding affecting the res. Kline v. Burke Construction Co., 260 U. S. 226; Covell v. Heyman, 111 U. S. 176. The federal court will enjoin the enforcement of a judgment obtained in the state court by fraud or mistake. Marshall v. Holmes, 141 U. S. 589; or the enforcement of a judgment of a state court which is void. Simon v. Southern Ry., 236 U. S. 115. A federal court will restrain a state court from disposing of crops in order to protect rights of the federal government, United States v. Inaba, 291 Fed. 416. In Prentis v. Atlantic Coast Line Co., 211 U. S. 210, and Public Service Co. v. Corboy, 250 U. S. 153, Section 265 was held not to apply to the exercise of legislative functions of state courts in pending proceedings.

Furthermore, the "proceeding" referred to by Section 265 is a valid and constitutional proceeding. Simon v. Southern Ry. 236 U. S. 115. As appellant was attempting to act under an unconstitutional and illegal statute, the prosecution in question was not a "proceeding" within the meaning of the Section. The Anti-Trust Act specifically charged appellant with a duty to prosecute its violators. As the act is invalid, the authority so given him is invalid and appellant had no authority or legal right to do what he was attempting to do, and the federal court was not ousted

of jurisdiction because he asserted such authority. As said in Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 391, the "court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." And as said by Mr. Justice Hughes in Philadelphia v. Stimson, 223 U. S. 605, 621: "Where an officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority and it is this absence of lawful power and his absence of authority in imposing or enforcing in the name of the state unwarrantable actions or restrictions to the irreparable loss of the complainant, which is the basis of the decree."

By the admitted facts (R. 21), the judge of the state court stated that he would be pleased if the federal court took jurisdiction and decided the question as to the unconstitutionality of the Act. No rule of comity could be violated in view of such consent, and approval by the State court of the course pursued. There was no attempt here to restrain the court or the jury but only an individual who was proceeding without authority and in violation of constitutional principles. As said by Mr. Justice Hughes in Philadelphia v. Stimson, 223 U. S. 605, 621: "In this there is no attempt to restrain a court from trying persons charged with crime nor the Grand Jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal proceedings to enforce illegal demands."

III

UNDER THE ISSUES MADE BY THE PLEADINGS, THE RIGHT TO ENJOIN THE PENDING PROCEEDING IS NOT BEFORE THE COURT.

The appellant filed a motion to dismiss under Equity Rule 29, directed to the whole, and not to any particular part, of the bill. When this was denied he refused to plead further and elected to stand upon his general motion to dismiss, (R. 33). The only question for this court to decide, therefore, is whether or not the motion to dismiss was properly denied. If the bill stated a cause of action for equitable relief, there was no error in the decision of the lower court, and it should be affirmed.

The motion to dismiss under Equity Rule 29 was substituted for the demurrer under the former practice. Connally v. General Construction Co., 269 U. S. 385, 391; General Inv. Co. v. Lake Shore & Mich. So. Ry. Co., 250 Fed. 160, 172.

It is well settled that a motion to dismiss must be denied or a general demurrer must be overruled where a good cause of action for equitable relief is stated. Livingston v. Storey, 9 Peters, 632, 658:

> "And if any part of the bill is good and entitles the complainant either to relief or discovery, a demurrer to the whole bill cannot be sustained."

Pacific Railroad Co. v. Missouri Pacific, 111 U. S. 569, 520: "The demurrers in this case are to the whole bill. If any part of the bill is good the demurrers fail."

Stewart v. Masterson, 131 U. S. 151, 158. "In addition to this as there is matter properly pleaded in the amended bill and properly ground for equitable relief which

requires an answer or a plea, and as the demurrer is to the whole bill, it ought to have been overruled."

Tilden v. Barbour, 227 Fed. 1010: "Under Rule 29 the pleading cannot be disposed of on motion unless there is an insufficiency of fact to constitute a valid cause of action in equity." Southern Bell Tel. & Tel. Co. v. Railroad Commission, 280 Fed. 901, 905; Commodores Point Terminal Co. v. Hudnall, 283 Fed. 150, 163; Board of Levy Commissioners v. Tensas Delta Land Co., 204 Fed. 736, 740.

Assuming the unconstitutionality of the Anti-Trust Act, the bill stated a cause of action for equitable relief against the appellant because of his threatened activity under the Act. Paragraphs X and XI of the bill (R. 10, 11) allege that the appellant was summoning witnesses before the Grand Jury which was then in session, questioning them with reference to the business of appellees, with the view of obtaining indictments of appellees under the Anti-Trust Act, was threatening further prosecution of the appellees and threatening to enforce the penalties under said Act by the institution of proceedings to forfeit the charters, rights and franchises of appellees. The motion to dismiss admits these allegations.

Appellant at page 9 of his brief admits that a court of equity will enjoin a threatened prosecution under an unconstitutional law. We have cited at page 25 of this brief the cases on the right to enjoin the enforcement of an unconstitutional law. We should not be understood as admitting in this argument that the lower court could not enjoin the district attorney from prosecuting the pending proceeding.

We therefore submit that as the bill stated a cause of action for relief against the threatened activities of appellant, there was no error in the lower court's denial of the motion to dismiss. The further question of whether or not

the lower court should enjoin the district attorney from prosecuting the pending criminal proceeding was not an issue raised by the general motion to dismiss and is not a question to be determined by this court upon appeal.

SUMMARY.

We respectfully submit that the Colorado Anti-Trust Act is unconstitutional. It violates Article XIV of the Amendments to the Constitution of the United States for two reasons:

(a) It is lacking in due process, as it is indefinite, and fails to fix an ascertainable standard of guilt.

(b) It denies to the appellees the equal protection of the law; it exempts from its operation farmers and co-operative marketing associations.

The lower court was confronted with this situation, set out in the bill: appellees' property rights were invaded, their business being destroyed, their existence threatened by unauthorized prosecutions under this Act. The remedy at law was wholly inadequate. Appellant moved to dismiss for want of equity. The court held that the bill stated a cause of action for injunction, denied the motion, and protected appellees' property rights in this extraordinary situation. Appellant stood on his motion and refused to plead further. We submit that the decisions of this court support the lower court, that there was no error, and the decision of the lower court should be affirmed.

Respectfully submitted,

A. J. FOWLER,
ERNEST B. FOWLER,
Solicitors for Appellees,
FRISK DAIRY COMPANY,
CLARENCE FRISK AND
A. T. MCCLINTOCK.

APPENDIX A

THE COLORADO ANTI-TRUST LAW (SESSION LAWS 1913 CHAPTER 161, PAGE 613—SECTIONS 4036 TO 4043, INCLUSIVE, COMPILED LAWS, 1921)

Section 1. A trust is a combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or by any two or more of them, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

Second. To increase or reduce the price of merchandise, produce or commodities.

Third. To prevent competition in the manufacturing, making, transportation, sale or purchase of merchandise, produce, ores, or commodities, or to prevent competition in aids of commerce.

Fourth. To fix any standard of figures, whereby the price to the public of any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State shall, in any manner, be controlled or established.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure; or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article or commodity or

transportation between them or themselves and others so as to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or by which they shall agree to so pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected.

And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed; provided further that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or own any interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodities; and provided further that labor, whether skilled or unskilled, is not a commodity within the meaning of this act.

Section 2. It shall be lawful to enter into agreement or form associations or combinations, the purpose and effect of which shall be to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade.

Section 3. For a violation of any of the provisions of this act by any corporation, or by any of its officers or agents mentioned herein, it shall be the duty of the attorney general of this State, or district attorney of any district in which said violation may occur, or either of them upon his

own motion to institute an action in any court of this State having jurisdiction thereof for the forfeiture of the charter, rights and franchise of such corporation, and the dissolution of its existence.

Section 4. Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises, or functions of a corporation in this State, violating any of the provisions of this act, is hereby denied the right and it shall be the duty of the Attorney General to enforce this provision by bringing proper proceedings by injunction or otherwise.

Section 5. Each and every person, company or corporation, the officers, agents or representatives thereof, violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to a fine of not more than one thousand dollars, or to imprisonment for not more than six months; and it shall be the duty of the Attorney General of the State, or the district attorney of any district in the State, in which said violation shall occur, or either of them, to prosecute and enforce the provisions of this act.

Section 6. Any contract or agreement in violation of any of the provisions of this act shall be absolutely void; and when any civil action shall be commenced in any court of this State it shall be lawful to plead in defense thereof that the cause of action sued upon grew out of a contract or agreement in violation of the provisions of this act.

Section 7. That any person, firm, company or corporation that may be damaged by any such agreement, trust or combination described in Section 1 of this act, may sue for and recover in any court of competent jurisdiction in this State, of any person, company or corporation operating such trust or combination, such damages as may have been thereby sustained.

APPENDIX B

RELEVANT PARTS OF THE COLORADO CO-OPERATIVE MARKETING LAW.

(Colorado Session Laws, 1923, Chapter 142, Page 420)

Section 1. (a) In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products and to provide for the organization and incorporation of co-operative marketing associations for the marketing of such products, this Act is passed.

Section 2. As used in this Act.

(a) The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products.

Section 3. Eleven (11) or more persons, a majority of whom are residents of this State, engaged in the production of agricultural products, may form a non-profit, co-operative association, with or without capital stock, under the provisions of this Act.

Section 4. An association may be organized to engage in the marketing or selling or in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization thereof, or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein.

Section 6. Each association incorporated under this Act shall have the following powers:

(a) To engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any agricultural products produced or delivered to it by its members, or the manufacturing or marketing of the by-products thereof; or any activity in connection with the purchase, hiring or use by its members of supplies, machinery or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. Any association in its option may limit itself in its articles of incorporation to the handling of products of its members only, or it may in its articles assume the right to handle the products of non-members, but, in such event, the association shall not handle for non-members a volume of products greater in the aggregate than the aggregate of products handled by it for its own members.

Section 7. (a) Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members, (or issue common stock to), only persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or any part of the crop raised on the leased premises.

(c) One association organized hereunder may become a member or stockholder of any other association or associations organized hereunder.

Section 18. The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified

commodities exclusively to or through the association, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide, among other things, that the association may sell or resell the products delivered by its members, with or without taking title thereto; and pay over to its members the re-sale price, after deducting all necessary selling, overhead and other costs and expenses, including interest or dividends on stock, not exceeding eight (8) per cent per annum, and reserves for retiring the stock, if any; and other proper reserves.

Section 19. (a) The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the members or stockholders to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

(b) In the event of any breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the as-

sociation shall be entitled to a temporary restraining order and preliminary injunction against the member.

Section 22. Any provisions of law which are in conflict with this Act shall be construed as not applying to the associations herein provided for.

Any exemptions whatsoever under any and all existing laws applying to argicultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its members, in the possession or under the control of the association.

Section 29. No association organized hereunder and complying with the terms hereof shall be deemed to be a conspiracy or a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or to fix prices arbitrarily nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this Act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose.

SUBJECT INDEX

CASES CITED

C

D

E

F

H

I

K

STATUTES AND RULES CITED

No. 31719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

FOSTER CLINE, as District Attorney for the City and County of Denver, State of Colorado,

Appellant,

vs.

FRINK DAIRY COMPANY, THE WINDSOR FARM DAIRY COMPANY, THE CLIMAX DAIRY COMPANY, Et al,

Appellees.

No. 304

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF OF THE WINDSOR FARM DAIRY COMPANY AND H. BROWN CANNON, Appellees.

THE TRIAL COURT'S OPINION

The opinion of the trial court rendered in the case at bar, will be found reported in full, entitled *Beatrice Creamery Company v. Cline*, in 9 Fed. (2nd) 176, and also at pages 37-50 of the record.

JURISDICTION OF THE COURT

The purpose of the complaint is to have declared unconstitutional, as violating the Fourteenth Amendment to the Constitution of the United States, the so-called Anti-Trust Act of the State of Colorado, set out in full in the complaint. (R. 3-6.)

The jurisdictional amounts are clearly averred in the complaint, (R. 2) and supported by affidavits (R. 15, 20, 22, 25 and 28). The final decree was entered in the trial court on December 14th, 1925. (R. 33.) The appeal is here by virtue of Section 266 of Judicial Code. The jurisdiction of this Court in such matters is so thoroughly established that further citation of authority is deemed unnecessary.

CORRECTIONS AND ADDITIONS TO APPELLANT'S STATEMENT OF THE CASE.

No appeal is taken from the interlocutory injunction, as erroneously stated by appellant at page 5 of his brief, but only an appeal from the final decree. (R. 34.)

By stipulation, affidavits of witnesses and the documents as filed and considered by the Court upon the hearing for interlocutory injunction, were considered by the Court in rendering the final decree. (R. 33).

The complaint as amended, specifically alleges the violation of the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, by the Colorado Anti-Trust Act. (R. 7).

Amendment to complaint alleged that the trial Judge of the State District Court had overruled and denied the unconstitutionality of the Statute, had refused to hear further argument, that under State procedure appellees were not permitted to appeal to the State Supreme Court to review the decision of the trial Judge until after the case had been tried to a jury; that such trial would entail upon appellees vexatious burdens, requiring them to produce and exhibit in Court, their private records and documents,

trade methods, trade secrets, methods of conducting business, prices they were required to pay for products, wages paid employees; expose them to public ridicule and contempt; injure their good name; destroy their business, alienate their customers and cause irreparable damage. (R. 14).

That the prosecution, whether successful or not, had, and would continue to have, the effect of destroying the good will, greatly diminishing the amount of business and threaten the very life and existence of the appellee corporations. That the loss to the Frink Dairy Company alone for the month of September, 1925, was more than $6,000.00. Appellees are unable to hold and maintain their former business (R. 17). That if the Anti-Trust Statute is held valid, appellees cannot in future follow their business in a free and unhampered manner. (R. 19).

The State District Judge rather invited the Federal Court to assume jurisdiction and determine the constitutionality of the Statute. (R. 21.)

Appellant avowed it his purpose and intention of instituting other proceedings and prosecutions and of taking action to forfeit the charters of appellee corporations (R. 23 and 26).

That the pending action and threatened actions of appellant have greatly lessened the value of the stock of The Windsor Farm Dairy and if continued will lessen and eventually destroy the value of the stock; that to continue the prosecution, whether successful, or unsuccessful, would lessen the value of the stock owned by appellee, Cannon, in a sum in excess of $25,000.00 (R. 27).

THE ARGUMENT.

I.

SUMMARY OF THE ARGUMENT.

The Colorado Anti-Trust Law, as amended by the Colorado Marketing Act and construed by the Supreme Court of the State of Colorado in *Rifle Association v. Smith*, 78 Colo. 171 violates the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, because:

(a) It furnishes no ascertainable standard of guilt as measured by the principles announced in the decisions of the United States Supreme Court construing the Lever Act and more recently in the case of *Connolly v. Gen. Construction Co.* 269 U. S. 385.

(b) It exempts from its provisions combinations gathering, owning, purchasing or dealing in agricultural products, and thereby denies to appellees the equal protection of the laws, as has been so clearly pointed out by this Court in the case of *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540.

The Colorado Anti-Trust Act being unconstitutional, and its enforcement having the effect of destroying valuable property rights of appellees, the Court had the power, and it was its duty to grant appellees injunctive relief.

(a) It was proper to enjoin appellant from instituting further civil and criminal proceedings to enforce the statute and from instituting civil actions to forfeit the charters of appellee corporations.

(b) Appellant filed his motion to dismiss in the nature of a general demurrer, that motion was overruled, he declining to plead further, the final decree was taken as confessed, the averments of the complaint entitled appellees to some measure of relief. Therefore, the question as to whether the Court had power to enjoin a pending prosecution, incidental to the main relief sought, was not properly raised in the trial Court and is not here for review.

(c) The Court had power and it was its duty to en-

join a pending prosecution incidental to the main relief sought, that of declaring the Colorado Anti-Trust Act unconstitutional, where, as here, no further relief could be obtained in the State Court by appeal or otherwise, without the infliction of great and irreparable damage to appellees.

II.

THE COLORADO ANTI-TRUST ACT IS UNCONSTITUTIONAL.

The act as amended and limited by the Colorado Marketing Act is unconstitutional and void because it violates the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that,

(a) It furnishes no ascertainable standard of guilt, and

(b) Organizations harvesting, marketing or dealing in agricultural products are exempt from it provisions.

The Anti-Trust Act and the Marketing Act are lengthy documents. They will be found as "Appendix A" and "Appendix B" to Appellant's Brief. It would serve no good purpose to reproduce them in this brief. Their salient features will be referred to as the argument proceeds.

---

1. THE COLORADO ANTI-TRUST LAW IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IN THAT IT DOES NOT FURNISH AN ASCERTAINABLE STANDARD OF GUILT.

The Colorado Anti-Trust Act in effect defines a trust as being a combination of capital, skill or acts affecting operations in a number of ways. It then provides that "no

agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit." To state the matter differently, all such combinations and agreements are valid if the object and purposes are to conduct operations at a reasonable profit, and invalid and inhibited if the object and purposes are to conduct operations at an unreasonable profit. The penalty for violating the act is a fine and imprisonment, and in case of a corporation, the forfeiture of its charter. (Anti-Trust Act, p. 26 Appellant's Brief).

It is submitted that the ultimate object of any and every monopoly is to conduct operations at a profit. Every combination inhibited by the Anti-Trust Act must have for its ultimate purpose the conduct of "operations" of some kind. "Restrictions in trade" would have such a purpose, "increase or reduced prices" the same, "to prevent competition" the same purpose, "to fix a standard of figures" clearly so, to divided territory could have no other ultimate purpose. If such "operations" have for their ultimate purpose the making of "a reasonable profit" under the terms of this statute, they are lawful; if of making more than a reasonable profit, they are criminal.

It is submitted that this Anti-Trust Act contains within itself no ascertainable standard of guilt and is therefore void. What is a reasonable profit for those engaged in the retail milk business, a very hazardous business at best? At what price must milk be sold in order for the retailer to "conduct operations at a reasonable profit?" How is a reasonable profit to be arrived at? How can a dairyman determine in advance at what price to sell his milk in order to receive a reasonable profit and only a reasonable profit? He indeed would be a prophet who could so determine. Such statutes are condemned.

Campbell v. People, 72 Colo. 213.
United States v. Trenton Potteries Co.,——U. S. —— (decided Feb. 21, 1927).
Connolly v. Gen. Construction Co., 269 U. S. 385.

U. S. v. Cohen Grocery Co., 255 U. S. 181.
Lewis D. G. Co. v. Tedrow, 255 U. S. 98.
Weeds v. U. S., 255 U. S. 109.
Kinnane v. Detroit Creamery, 255 U. S. 102.
U. S. v. Penna. Ry., 242 U. S. 208.
International Harvester Co. v. Kentucky, 234 U. S. 216.
Collins v. Kentucky, 234 U. S. 634.
American Seeding Co. v Kentucky, 236 U. S. 660.
Missouri-Pacific v. Nebraska, 217 U. S. 196.
U. S. v. Brewer, 139 U. S. 278.
U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290.
U. S. v. Reese, 92 U. S. 214.
U. S. v. Cap. Tracting Co., 34 App. Cases D. C. 592.
Louisville v. Commonwealth, 99 Ky. 132.
Tozer v. U. S., 52 Fed. 917.
Detroit Creamery Co. v. Kinnane, et al, 264 Fed. 845.
State v. Lantz, 90 W. Va 738.

The Supreme Court of Colorado in *Campbell v. People*, 72 Colo. 213, in applying the Anti-Trust Act to a monopoly restricting the free employment of labor, at page 216, says:

> "The second point is seen to be of no force when we observe that the monopoly which would be created by the complete success of the combination which is charged would be a monopoly in the business of plumbing. The agreement then is not a contract in respect to labor alone nor does its intent relate to labor alone, but it aims, through a contract in regard to labor, *to control the business of plumbing in Colorado Springs.* We do not agree that the sole purpose of the act was to prevent *the restriction of dealing in commodities* but

> think that it was also to *prevent the restriction of competition* and the attainment of the control of a business, i. e., monopoly." (Italics ours.)

Either purpose must of necessity have in view "operations" of some character. If "reasonable profits" only are in contemplation, no crime, if more than "reasonable profits," criminal.

In the Connally case, 269 U. S. 385, this Court, speaking through Mr. Justice Sutherland, has recently covered this subject in a manner which leaves little more to be said. The Court reviews the decisions in which statutes have been upheld as being sufficiently certain and places them in one of three classes: (a) those having a technical or special meaning well enough known to enable parties within their reach to correctly apply them; (b) those which have a well-settled common law meaning; (c) and those affording a standard of some sort. At page 391 the Court says:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The statute there being construed provided that no less than the current rate of per diem wages in the locality where the work is performed should be paid to labor, etc. It was held that no ascertainable standard of guilt was furnished.

We submit that neither the words "reasonable profit," as applied to a retail milk business, nor the price at which milk should be sold in order to produce "a reasonable

profit" have a technical or special meaning, nor have they any well-settled or common law meaning, nor is there afforded a standard of any sort by which appellees may be guided.

The cases of *U. S. v. Cohen Grocery Company, Lewis D. G. Co. v. Tedrow, Weeds v. U. S.* and *Kinnane v. Detroit Creamery Company, supra*, all grow out of the Lever Act. That act among other things, provides "that it is hereby made unlawful for any person * * * wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries * * *" It was held unconstitutional because no ascertainable standard of guilt was furnished.

It is submitted with confidence that those decisions are decisive of the question here. If there is a difference in prohibiting the sale of articles at an "unreasonable rate or charge," as in the Lever Act and the conduct of operations at "a reasonable profit," i. e., the sale of articles at a price which will produce a reasonable profit as in the Colorado Act, the difference is a matter of degree and not of principle. If the one provision violates the constitution, the other must do likewise.

In *United States v. Trenton Potteries Company*, decided February, 1927, construing the Sherman Act, this Court says, "Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law. * * * * The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow."

The cases of *International Harvester Company v. Kentucky, Collins v. Kentucky, American Seeding Company v. Kentucky, supra*, all involved the construction of the Kentucky Trust Law. In the Collins case, 234 U. S. 634, Mr. Justice Hughes, speaking for the Court, at page 638 of the opinion says:

> "The statute by reason of its uncertainty, was fundamentally defective."
>
> "He was thus bound to ascertain the 'real

> value,' to determine his conduct, not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions and endeavoring to conjecture what would be the value under other and so-called normal circumstances with fair competition, eliminating the abnormal influence of the combination itself, and of all other like combinations, and of still other combinations which these are organized to oppose."

In the Brewer case, 139 U. S. 278, at page 288, the Court says:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what act it is their duty to avoid."

In the Reese case, 92 U. S. 214, the Court had before it the indictment of an inspector of an election for refusal to receive and count a vote, at page 220, the Court says:

> "Penal Statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

In the Tozer case, 52 Fed. 917, supra, decision by Judge, later, Justice Brewer, the Court at page 919, said:

> "In order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it *reasonable or unreasonable*. There must be some definiteness and certainty. • • • • There is a very little difference between such a statute and one which would make it a criminal

offense *to charge more than a reasonable rate.* (Italics ours.)

In *U. S. v. Pennsylvania*, 242 U. S. 208, supra, the words "reasonable request" and "reasonable notice" are criticized as being too indefinite, but the case was decided upon another point.

We conclude this portion of our brief with a quotation from the opinion of Judge Tuttle of the District Court, rendered in the case of *Detroit Creamery Company v. Kinnane*, 264 Fed. 842, the same case as that Supra, 255 U. S. 102, which points out some of the difficulties facing the appellees in the case at bar. That case involved the fixing of prices for milk claimed to be in violation of the Lever Act. Judge Tuttle at page 850 of the opinion says:

> "Such an indictment, however, could not specify the offense thus charged with any more detail, for the reason that the statute purporting to create such offense does not state the facts, acts or conduct necessary to constitute the crime denounced. What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test, or standard, or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom. If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable, and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined, so that the person engaging in such business may know

> whether or not he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to these expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate of charge be unjust, to be "unjust" within the meaning of this statute? Is it the effect which a rate or charge has upon the seller, or which it has on the purchaser, which renders it reasonable or unreasonable?"

So here, where is there a standard to guide appellees in determining their "conduct of operations" so as to produce "a reasonable profit" and only a reasonable profit? How are they to know at what price to retail milk in order to obtain that result?

---

2. THE COLORADO ANTI-TRUST LAW IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IN EXEMPTING FROM ITS PROVISIONS COMBINATIONS HARVESTING, MARKETING OR DEALING IN AGRICULTURAL PRODUCTS.

As amended by the Marketing Act and interpreted by the Supreme Court of Colorado, the Colorado Anti-Trust Act exempts from its provisions combinations harvesting, marketing or dealing in agricultural products, thereby denying to appellees and others, due process and the equal

protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

Colorado Anti-Trust Act, page 26, Appellant's Brief.

Colorado Marketing Act, page 30, Appellant's Brief.

Rifle Potato Growers Ass'n v. Smith, 78 Colo. 171.

Connolly v. Union Sewer Pipe Company, 184 U. S. 540.

Beatrice Creamery Co. v. Cline, 9 Fed. (2nd) 176.

By reference to the Colorado Anti-Trust Act (p. 27 Appellant's Brief) it will be seen that persons, firms or corporations engaged in the business of selling or manufacturing commodities of a similar or like character may employ, form, organize or own an interest in associations, firms or corporations transporting, marketing, or delivering such commodities without coming within the provisions of that Act.

The Colorado Marketing Act (p. 30 of Appellant's Brief) authorizes the formation of associations for the harvesting, marketing and dealing in agricultural products. Paragraphs 22 and 29 (p. 39 and 40 of Appellant's Brief) read as follows:

"Section 22—Any provisions of law which are in conflict with this Act shall be construed as not applying to the associations herein provided for."

"Section 29—No association organized hereunder and complying with the terms hereof shall be deemed to be a conspiracy or a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or to fix prices arbitrarily nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this Act be considered illegal as such or in unlawful restraint

of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose."

The Colorado Marketing Act was interpreted and construed by the Supreme Court of Colorado in the case of *Rifle Potato Growers Association v. Smith*, 78 Colorado, 171. At page 175, the Court says:

> "In support of the act the plaintiff in error has cited *Oregon Growers Co-Operative Association v. Lantz*, 107 Ore. 561, 212 Pac. 811. That case, however, is not in point, because the Oregon act applied to all persons, not to agriculturists alone, nor to any specified class. The question, therefore, under our act, become a serious one, because by sections 1 and 3 the above privilege is conferred only upon persons engaged in the production of agricultural products and is applied to agricultural products alone."

And at page 174, the Court further says:

> "It is objected that the contract is in restraint of trade and so void under the Colorado Anti-Trust Law (C. L. 1921, par. 4036-4043), but the act of 1923, being the later act, *controls the earlier.*" (Italics ours.)

Circuit Judge Lewis, speaking for the Court, below in the case at bar, at page 180 of the reported case, says:

> "Nothing can be plainer than that these combinations authorized through the formation of the associations as provided for in the Act would, in fact, be combinations in restraint of trade and an attempt to lessen competition in the marketing of agricultural products. A declaration that they should not be so considered is as futile as a statement that white is black."

And again,

> "There can be no doubt that the later act

> (Marketing Act) exempted the associations which it authorized from the penalties and restrictions of the earlier (Anti-Trust) Act."

It must be admitted that the effect of the Colorado Marketing Act is both by its terms and as construed by the State Supreme Court, to amend or write into the Colorado Anti-Trust Act, a provision exempting from its provisions associations harvesting, marketing or dealing in agricultural products.

It is settled law that the Federal Courts will accept the interpretation and construction placed upon State Statutes by the State Supreme Court.

> *Swiss Oil Corporation v. Shanks*, ——U. S. (decided February 21, 1927).

The question then presents itself, Does the exclusion of combinations engaged in harvesting, marketing or dealing in agricultural products, from the provisions and penalties of the Anti-Trust Act, deny to appellees and others due process and the equal protection of the laws guaranteed by the Fourteenth Amendment, and by so doing render the Anti-Trust Act unconstitutional?

That question we submit has been settled for all time by this Court in the case of *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540. That case involved the construction of the Anti-Trust Act of the State of Illinois. That Act in its main provisions was similar to the Anti-Trust Act of Colorado. The 9th Section of said Act reads:

> "The provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

In holding the Illinois Act unconstitutional this Court, at page 563 of the opinion says:

> "A state may in its wisdom classify property for purposes of taxation, and the exercise of its

discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates. * * *"

And at page 564:

"Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive

why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live stock raisers, may make combinations of that character in reference to their grain or livestock without incurring the prescribed penalty. Under what rule or permissible classification can such legislation be sustained as consistent with the equal protection of the laws? * * * We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

Appellant, at page 16 of his brief asserts that while the Connolly case has not been overruled, it has been modified by later decisions of this Court, and cites three cases in support of that statement. The first case, *New York Central Company v. White*, 243 U. S. 188, involved the construction and application of the New York Workmen's

Compensation Law. The second case, *Miller v. Wilson*, 236 U. S. 373, involved the construction of a California statute, regulating the hours of work for women. The application of the Connolly case to the questions involved in those cases is not apparent. The third case, *International Harvester Company v. Missouri*, 234 U. S. 199, involved the construction of the Missouri Anti-Trust law. The only reference there to the Connolly case is in the concluding paragraph, at page 215 of the opinion, where the Court says:

> "It is said that the statute as construed by the supreme court of the state comes within our ruling in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, but we do not think so. If it did, we should, of course, apply that ruling here."

Appellant cites Section 6 of the Clayton Act, which exempts "agricultural or horticultural organizations, instituted for the purposes of mutual help and not having capital stock or conducted for profit." And also, the decision of this court in the case of *Duplex Company v. Deering*, 254 U. S. 443, construing that section. However, the Colorado Marketing Act provides for organizations with both common and preferred shares with power to harvest, purchase, own, sell and market agricultural products of its members and non-members alike. The main and controlling purpose of such organizations being to control the market and thereby the market price of agricultural products for the profit and gain of its members. The Clayton Act has no application here.

Appellant at great length endeavors to show that the Colorado Marketing Act and similar acts are valid. Its validity, however, as held by the Supreme Court of Colorado in the Potato Growers case, Supra, is dependent upon the fact that such organizations are withdrawn and exempted from the provisions of the Colorado Anti-Trust Act. The trial court at page 180 of the reported case below, says:

"Of course, we do not pretend to say that the Legislature did not have the power to exempt such combinations from prosecution and dissolution as unlawful common law or stautory trust. That was entirely a matter for its consideration."

We are not here contending that the Marketing Act is void, nor is it necessary to criticise public policy claimed to be the basis of such acts. We are simply saying that neither the Marketing Act, nor the Anti-Trust Act can suspend, or modify the Fourteenth Amendment to the Constitution of the United States so as to permit trusts or combinations to harvest, deal in or market agricultural products and at the same time condemn combinations producing or marketing other commodities. Can it be said that the State of Colorado can by legislation permit and encourage combinations to fix and control the price of agricultural products, the State's largest industry, and declare the same or similar combinations criminal when engaged in gathering or marketing coal and minerals, the State's second largest industry?

III.

THE COLORADO ANTI-TRUST ACT BEING UNCONSTITUTIONAL APPELLEES WERE ENTITLED TO THE WRIT OF INJUNCTION.

The complaint alleges that it was appellant's purpose and intention of at once instituting civil proceedings for the forfeiture of the Articles or Charters of the three appellee corporations. That it was his purpose to file other criminal informations and procure grand jury indictments, either or both of which proceedings would utterly destroy the good will and property of appellees, and also that there was pending an information against all of appellees charging them with conspiracy to violate the law. These facts were alleged in the complaint and the complaint taken as confessed.

Injunctive relief granted appellees was proper:

(a) Injunction will issue to restrain the institution of civil and criminal proceedings under void statutes where property rights are being jeopardized.

(b) The question whether injunction will issue to stay pending prosecutions was not properly raised in the trial court is not here for review.

(c) If otherwise, such relief will be granted, particularly under the facts of the case at bar.

1. THREATENED PROCEEDINGS, CIVIL OR CRIMINAL, UNDER UNCONSTITUTIONAL STATUTES WILL BE ENJOINED WHERE NECESSARY TO PROTECT PROPERTY RIGHTS.

The principal purpose of the complaint was to have the Colorado Anti-Trust Act declared unconstitutional and to prevent the institution of proceedings for the forfeiture of the charters of appellees, the consequent appointment of receivers and thereby the utter destruction of appellee's business, good will, property and property rights, and also to enjoin the institution of further criminal proceedings based upon said act having the same effect. Granting the law to be unconstitutional, it is too well settled that appellees are entitled to such relief to require extended argument.

The trial court below, at page 181 of the opinion finds:

> "The District Attorney and the Attorney General of the State, who also made argument and submitted brief, do not deny that it is the duty of the court, on the facts stated, to grant the writ enjoining the institution of further court proceedings, civil and criminal, if we hold the Anti-Trust Act to be unconstitutional."

Such is the law even though not conceded by appellant:

Philadelphia v. Stimson, 223 U. S. 605.

Truax v. Raich, 239 U. S. 33.

Kennington v. Palmer, 255 U. S. 100.
Terrace v. Thompson, 263 U. S. 197.
Packard v. Banton, 264 U. S. 140.
Hygrade Provision Co. v. Sherman, 266 U. S. 497.
Tyson & Bros. v. United Theatre Ticket Offices— U. S. (decided Feb. 28, 1927).

In the case of Packard v. Banton, at page 143, this court says:

> "But it is settled that 'a distinction obtains and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property'. *Truax v. Raich*, 239 U. S. 33. The question has so recently been considered that we need do no more than cite *Terrace v. Thompson*, 263 U. S. 197, where the cases are collected, and state our conclusion that the present suit falls within the exception, and not the general rule."

In *Tyson & Bros. v. Ticket Offices*, Supra, this court said:

> "Following the rule frequently announced by this court, that 'equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property,' we sustain the jurisdiction of the District Court."

2. THE QUESTION AS TO WHETHER THE COURT WILL ENJOIN A PENDING PROSECUTION IS NOT PROPERLY HERE FOR REVIEW

In the trial court appellant filed his motion to dismiss, which was in the nature of a general demurrer, and in which the complaint was attacked as a whole, as being with-

out equity because the facts stated were insufficient to entitle appellees *to any* relief. No attack was made in the motion against those parts of the complaint setting up the pendency of prosecutions nor against the specific prayer asking that such actions be enjoined. (R. 12.) The motion being denied appellant declined to plead further and a decree pro confesso was entered (R. 33). It may be added that the interlocutory injunction became functus officio when the final decree become effective. No appeal is taken therefrom (R 34). So the question here is whether the complaint taken in its entirety entitled appellees to equitable relief, and possibly the further question of whether the final decree is justified by the facts set forth in, and the relief sought by, the complaint.

Equity rule 29 provides how defenses may be urged. It is there clearly stated that defense may be made by motion to dismiss or in the answer, and that such points of law as go to the whole or a material part of the cause can be set down and heard separately. It is there further provided, that if the motion be denied answer shall be filed in five days or a decree pro confesso entered.

Incidentally it may be observed that when the interlocutory injunction was granted the court divided two to one on the question of appellees right to enjoin the pending prosecutions, but that when the complaint was taken as confessed and the final decree entered in conformity with the complaint the three Judges joined in the granting of the same.

If it was the intention of appellant to attack some part of the complaint, less than the whole, it should have been done by motion directed to that part of the complaint so assailed, or in the answer.

If then, the law be unconstitutional, as we contend appellees were entitled to some measure of relief and this court will not inquire whether the relief granted was greater than that to which appellees might otherwise be technically entitled, if the relief granted is supported by the allegations in the complaint as amended.

In the case of *Masterson v. Howard*, 85 U. S. 99, first syllabus prepared by Mr. Justice Field, it is said:

> "Where a decree is entered upon an order taking a bill in equity as confessed by defendants for want of an answer, the only question for the consideration of this court on appeal is, whether the allegations of the bill are sufficient to support the decree."

In *Thompson v. Wooster*, 114 U. S. 104, a case in which a decree was taken as confessed, this court at page 110 says:

> "The defendants are concluded by that decree, so far at least as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself."

3. INJUNCTION WILL BE GRANTED RESTRAINING PENDING PROSECUTIONS UNDER INVALID STATUTES WHERE THEIR CONTINUANCE WILL INVADE AND DESTROY VALUABLE PROPERTY RIGHTS, WHERE AS HERE, RELIEF CANNOT BE HAD IN STATE COURTS.

We think it appropriate to set forth here the interpretation of the pleadings and findings of fact as made by the trial court bearing upon this question. At page 181 of the opinion the court below says:

> "The pleadings here and affidavits in support disclose that the State District Judge overruled motions to quash the information, declined to hear further argument from defendants' counsel in that case on the unconstitutionality of the State Anti-Trust Act, and has set that case down for trial

at an early date. Under the State practice defendants in a criminal case cannot be heard in the State Supreme Court until after conviction, and the removal of their case to that court after the happening of that event, and putting it in condition to be finally heard there, required time, frequently extended by unexpected delays. We are further informed by the proof that the record in that case will necessarily be voluminous. The four corporate defendants are jointly charged; their books and records will become competent proof in arriving at the question as to what are reasonable prices and profits for their products, which will involve a full investigation of the business of each company and require expert testimony. Such a record cannot be put in shape for the appellate court until after the lapse of many months. In the meantime the Act prohibits them from transacting any business in the State of Colorado. A verdict of guilty will be conclusive proof that they have violated the State Anti-Trust Act. It will also be conclusive proof in a suit to forfeit their rights and franchises and dissolve them, and a good defense in actions they may bring against their debtors. Under the charges made in the bills it therefore seems clear that further prosecution of the pending information is but a step in the invasion of their property rights, and if continued those rights will be wholly destroyed under an invalid law."

Under this state of facts we submit it was the duty of the trial court to enjoin the pending prosecution, which was incidental to the main relief sought.

Farnum & Davis v. Los Angeles, 189 U. S. 207.

Truax v. Raich, 239 U. S. 33.

Missouri v. Chicago Railway Co., 241 U. S. 533.

Oklahoma Gas Company v. Russell, 261 U. S. 290.

Dearborn Pub. Co. v. Fitzgerald, 271 Fed. 479.
Springfield Spinning Co. v. Riley, L. R., 6 Eq. 551.

In the Farnum & Davis case, Supra, the object sought was to have declared unconstitutional certain ordinances of the City of Los Angeles and to enjoin pending prosecutions thereunder. The court at page 217 says:

> "As the only method employed for the enforcement of these ordinances was by criminal proceedings, it follows that the prayer of the bill to enjoin the city from enforcing these ordinances, or prevent plaintiff from carrying out its work, must be construed as demanding the discontinuance of such criminal proceedings as were already pending, and inhibiting the institution of others of a similar character."

And upon these facts, the court at page 218 says :

> "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceedings. *Springfield Spinning Co. v. Riley, L. R.*, 6 Eq. 558."

The Springfield case, Supra, cited with approval in the Farnum & Davis case, at page 558, holds that:

> "The jurisdiction of this court is to protect property, and it will interfere by injunction to stay proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate distribution of property, or make it less valuable or comfortable for use or occupation."

In *Truax v. Raich*, 239 U. S. 33, the Court at page 37 says:

> "It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors', a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property."

It will be noted that the court does not there say that "threatened criminal prosecution" will be enjoined, but contents itself with saying that "criminal prosecutions" will be enjoined.

At this point we desire to emphasize the first portion of the trial court's findings, as above set out, to the effect that appellees had exhausted their effort to obtain relief in the State Court. And in addition to the facts, there stated, it appears that the retail milk business is largely a matter of good will; that the conduct of a trial to a jury would furnish a local hostile press the opportunity of destroying that good will and would otherwise have the effect of destroying property and property rights, which could never thereafter be restored, even though on final appeal the act was held unconstitutional (original transcript p. 67).

We submit that these facts bring the case squarely within the principle announced by this court in the case of *Oklahoma Gas Company v. Russell*, 261 U. S. 290. In that case the corporation commission had fixed rates which were alleged to be confiscatory. An appeal was taken to the State Supreme Court. A supersedeas staying the operation of the rates was denied by the Supreme Court pending the hearing of the case upon its merits. This court holding that under such circumstances injunctive relief would be granted, speaking through Mr. Justice Holmes, at page 293 of the opinion says:

> "Coming to the principal question, if the plaintiffs respectively can make out their case, as

must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they now are limited. They have done all that they can under the state law to get relief and cannot get it. If the Supreme Court of the state hereafter shall change the rate, even nunc pro tunc, the plaintiffs will have no adequate remedy for what they may have lost before the court shall have acted. *Springfield Gas & E. Co., v. Barker*, 231 Fed. 331, 335. In such a state of facts *Prentis v. Atlantic Coast Line Co.* has no application. See *Love v. Atchison, T. & S. F. R. Co.*, 107 C. C. A. 403, 185 Fed. 321, 324, 325. Rules of comity or convenience must give way to constitutional rights."

This Court has frequently said Section 265 of the Judicial Code announces a rule of comity. As tersely put by Mr. Justice Holmes in the Oklahoma Gas Company case,

> "Rules of comity or convenience must give way to constitutional rights."

The cases of, in re, *Sawyer: Harkrader v. Wadly* and *Fitz v. Magee*, cited by appellant on this question are reviewed and classified by this court in the Farnum & Davis case, Supra, as simply announcing the general rule of comity and having no application to the exceptions.

The case of Ex Parte Young, 209 U. S., involved the question of Minnesota freight rates, was not brought to enjoin a pending action and the statement at page 162 to the effect that such action will not be enjoined is clearly dictum.

The cases of *Essanay Film Co. v. Kane*, 258 U. S. 358, and *Hull v. Burr*, 234 U. S. 712, cited by appellant, are cases illustrative of the general rule and not the exceptions which we here urge. In the Essanay case, this court in speaking of the rule, at page 361 of the opinion says:

> "In exceptional instances the letter has been

> departed from while the spirit of the prohibition has been observed."

And at page 362,

> "The case before us presents no exceptional features and the courts below correctly disposed of it."

To hold that the court having jurisdiction of the parties and the subject matter, had power to grant only partial relief, is to deny to a Federal Court of Equity that power supposed to be inherent in every court of equity, under similar circumstances, to grant full relief. The trial court on this phase of the case, at page 182 of the reported opinion says:

> "Where a criminal prosecution results directly in the invasion and destruction of property rights, we do not doubt that it is within the power and duty of a court of equity to enjoin the administrative officer who has charge of that prosecution if there be no valid law on which the accusation rests. The claimed difference, under those conditions, between pending and threatened cases is, in our judgment, without substance. We venture to say, on the authority of the Davis & Farnum case, that it can make no difference, on the question of jurisdiction, when prosecution is begun under an invalid law, whether before or after a bill is exhibited, if there be an unlawful invasion by virtue thereof of property rights."

IV.

CONCLUSION.

We therefore, respectfully submit:

First. That the Colorado Anti-Trust Act is unconstitutional because it furnishes no ascertainable standard of guilt, and further in exempting from its provisions dealers in agricultural products, it denies the equal protection of the laws to appellees.

Second. That valuable property rights of appellees are jeopardized by the enforcement of said Act.

Third. That the trial court had the power, and under the circumstances of the instant case, it was its duty to declare the Act void and to enjoin its enforcement in every manner, including threatened and pending actions, civil and criminal.

Respectfully submitted,

WILBUR F. DENIOUS,
HUDSON MOORE,
Solicitors for The Windsor Farm Dairy Company and H. Brown Cannon, APPELLEES.

SUPREME COURT OF THE UNITED STATES.

No. 304.—October Term, 1926.

Foster Cline, as District Attorney for the City and County of Denver, State of Colorado, Appellant, vs. Frink Dairy Company, The Windsor Farm Dairy Company, The Climax Dairy Company, Corporations of Colorado; H. Brown Cannon, Clarence Fink, A. T. McClintock, and Morris Robinson, Appellees.	Appeal from the District Court of the United States for the District of Colorado.

[May 31, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a direct appeal under sec. 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, from a final decree of the United States District Court of Colorado, three Judges sitting, granting a permanent injunction against the enforcement by a state officer of a state law on the ground of its unconstitutionality. The bill was brought by the Frink Dairy Company, the Windsor Farm Dairy Company and the Climax Dairy Company, corporations of Colorado, and H. Brown Cannon, Clarence Frink, A. T. McClintock and Morris Robinson, citizens and residents of the same State, against Foster Cline, the District Attorney for the City and County of Denver, Colorado.

The bill alleges that the suit involves for decision the question of the validity under the Constitution of the United States of what is known as the Colorado Anti-Trust Act, being chapter 161 of the Session Laws of the State of Colorado, for 1913, approved April 17th of that year. It avers that the three dairy companies have been separately conducting for years in Denver, Colorado, and its vicinity, the sale and distribution of milk, butter and all manner of dairy products, that each has invested in its business more than $100,000, that they are also engaged in interstate commerce, buying

and selling from without the limits of the State; that the individual plaintiffs, Cannon, Frink and Morrison, are respectively officers and stockholders of the three plaintiff companies, that McClintock, the other individual plaintiff, is an officer and stockholder of the Beatrice Creamery Company, a corporation of Delaware also in the dairy business in Denver, that the individual plaintiffs, experienced dairymen, by painstaking effort, fair dealing, and careful management, have gained thousands of customers, and a well-established trade, and that their companies, in addition to their tangible property and assets, have good wills of great value. The bill sets out in full the Colorado anti-trust law which punishes as a crime combinations of persons and corporations to restrain trade or commerce with certain exceptions, and makes it the duty of the defendant, the District Attorney, to prosecute alleged violations thereof and to institute actions for forfeiture of charters of associations engaged therein. All contracts violating the act are avoided; violation of the act is made a good defense to a suit for merchandise that was sold in pursuance of a combination under it; and a right of action for damages against the combiners is given to any one injured by the combination. One charge of the bill, among others, is that the act violates the Fourteenth Amendment of the Constitution, in that it deprives the plaintiffs of their liberty without due process of law, because it is indefinite and uncertain and fails to fix any informing standard of criminality.

The bill alleges that Foster Cline, the defendant, in his capacity as district attorney of Denver City and County, has been and still is, claiming that the plaintiffs and their competitors have been and now are acting in violation of the Anti-Trust law; that he has caused an information to be filed in the criminal division of the District Court of the City and County of Denver, in which the plaintiffs and the Beatrice Creamery Company, a Delaware corporation, are charged with conspiracy to violate the Anti-Trust Act; that he expects to press the case to trial; that since the case was instituted, the grand jury has been in session and many witnesses summoned and questioned about the plaintiffs' milk business; that the defendant Cline has threatened and unless restrained by the court will institute further prosecutions, file further informations and attempt to procure indictments of the plaintiffs by the grand jury; and that Cline by this multiplicity of criminal

suits and prosecutions, as well as by the civil suits for forfeiture of the corporate plaintiffs' charters he has threatened to bring, has already inflicted serious loss to the businesses and properties of the plaintiffs and that they will be irreparably and immeasurably damaged thereby unless he is restrained.

A motion to dismiss was made by the defendant, on the ground that the bill presented no case for equitable relief. On the hearing before the three judges, a preliminary injunction was issued and the motion to dismiss was denied. The defendant standing upon his motion to dismiss and declining to plead further, a decree for a permanent injunction was entered, and this is an appeal from that decree.

The first question is whether the practice and precedents in equity justified the granting of relief by injunction where one criminal prosecution had been begun and where many others, together with suits for forfeiture of corporate franchises, were threatened. The general rule is that a court of equity is without jurisdiction to restrain criminal proceedings to try the same right that is in issue before it; but an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate. *Fenner* v. *Boykin*, 271 U. S. 240, 243; *Packard* v. *Banton*, 264 U. S. 140; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 502; *Terrace* v. *Thompson*, 262 U. S. 197, 214; *Ex parte Young*, 209 U. S. 123; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 218; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236, 241; *In re Sawyer*, 124 U. S. 200, 209, 211.

The affidavits in support of the bill were very full in their showing that the District Attorney by his action and threats had already greatly injured their properties and their businesses. They present a case in which the question of the validity of the Act under which, if invalid, great injuries to properties and businesses are being unjustly inflicted should be promptly settled. We think the basis for equitable jurisdiction is made sufficiently clea

It is objected, however, that the injunction can not be supported under the authorities, in so far as it is directed against actual proceedings pending in the criminal court. One of the District

Judges below dissented from this part of the decree. Of course the injunction is not only against actual prosecution but is also against a multiplicity of future suits and the threatened proceedings for forfeiture, by which the Attorney General proposes to end the businesses of all the plaintiffs, and the objection would only lead to a narrowing of the decree. The majority in the District Court were influenced by a remark of this Court in *Davis & Farnum Company* v. *Los Angeles*, supra, in speaking of a bill to restrain invasion of rights of property by the enforcement of an unconstitutional law, in which the Court said:

"It would seem that if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding."

This *semble* does not seem to have received the approval of the Court in *Ex parte Young*, 209 U. S. 123, where it was said:

"It is further objected (and the objection really forms part of the contention that the State can not be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. Prout v. Starr, 188 U. S. 537, 544. But the Federal Court can not, of course, interfere in a case where the proceedings were already pending in a state court. Taylor v. Taintor, 16 Wall. 366, 370; Harkrader v. Wadley, 172 U. S. 148."

We therefore agree with the view of the dissenting Judge that the injunction is too broad, in so far as it restrains proceedings actually pending, and that it must be accordingly modified.

This brings us to the consideration of the constitutionality of the Anti-Trust Act. We think that the act is so vague and uncertain in its description of what shall constitute its criminal violations that it is invalid under the Fourteenth Amendment. It in this respect violates due process and can not be distinguished from the case of *United States* v. *Cohen Grocery Company*, 255 U. S. 81.

The law there under consideration was the fourth section of the Lever Act re-enacted in 1914, Act of October 22, 1919, c. 80, sec. 2, 41 Stat. 297. It provided as follows:

"That it is hereby made unlawful for any person willfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person to exact excessive prices for any necessaries. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both."

This Court said:

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words, 'That it is hereby made unlawful for any person willfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries', constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

The opinion cites in support of its conclusion, United States v. Reese, 92 U. S. 214, 219-220; United States v. Brewer, 139 U. S. 278, 288; Todd v. United States, 158 U. S. 278, 282; United States v. Sharp, 27 Fed. Cases, 1041, 1043; Chicago & Northwestern Ry. Co. v. Day, 25 Fed. 866, 876; Tozier v. United States, 52 Fed. 917, 919-920; United States v. Capital Traction Co., 34 App. D. C. 592; United States v. Pennsylvania R. R. Co., 242 U. S. 208, 237-238; also International Harvester Company v. Kentucky, 234 U. S. 216, 221; Collins v. Kentucky, 234 U. S. 635, 637; American Seeding Machine Company v. Kentucky, 236 U. S. 610, 632.

The Colorado Anti-Trust law denounces conspiracies and combinations of persons and corporation, 1st, to create and carry out restrictions in trade or commerce preventing the full and free

pursuit of any lawful business in the State; 2nd, to increase or reduce the price of merchandise, products or commodities; 3rd, to prevent competition in the making, transportation, sale or purchase of commodities or merchandise; 4th, to fix any standard of figures whereby the price shall be controlled or established; 5th, to make or execute any contract or agreement to bind the participants not to sell below a common standard, or to keep the price of the article at a fixed or graded figure, or establish or settle the price between themselves so as to preclude a free and unrestricted competition among themselves, or to pool, combine or unite any interest they may have in such business of making, selling or transporting that the price of the article may be affected. The foregoing language sufficiently describes for purposes of a criminal statute the acts which it intends to punish, but the Colorado law does not stop with that. It is accompanied by two provisos which materially affect its purport and effect. They are as follows:

"And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at reasonable profit those products which can not otherwise be so marketed; provided further that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or own any interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodities; . . . ."

The effect of the first proviso is that combinations, with the purposes defined in the 1st, 2nd, 3rd, 4th and 5th paragraphs of section 1, and declared thereby to be unlawful and void, are not to be regarded as unlawful if their purpose shall be to obtain only a reasonable profit in such products or merchandise as can not yield a reasonable profit except by marketing them under the combinations previously condemned. The second is like the first in declaring that it shall not be unlawful or within the condemnatory provisions of the Act for persons engaged in the business of selling or manufacturing commodities of a class that can only be dealt with at a reasonable profit by such previously condemned trust methods, to employ or own interests in an association having as its

object the transportation, marketing or delivering of such commodities at a reasonable profit. These provisos make the line between lawfulness and criminality to depend upon, first what commodities need to be handled according to the trust methods condemned in the first part of the Act to enable those engaged in dealing in them to secure a reasonable profit therefrom; second, to determine what generally would be a reasonable profit for such a business; and third, what would be a reasonable profit for the defendant under the circumstances of his particular business. It would, therefore, be a complete defense for the defendant to prove in this case that it is impossible to sell milk or milk products, except by trust methods and make a reasonable profit, if he also showed that by such methods he had in fact only made a reasonable profit.

We have examined the opinions of the Supreme Court of Colorado in reference to the construction and operation of these provisos in the Colorado Anti-Trust law. *Campbell* v. *The People*, 72 Colorado, 213; *Johnson* v. *The People*, 72 Colorado, 218; *People* v. *Apostolos*, 73 Colorado, 71; and we find nothing there which is in conflict with our construction of them. Such an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused. An attempt to enforce the section will be to penalize and punish all combinations in restraint of trade in a commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make it reasonably profitable, but not otherwise. Such a basis for judgment of a crime would be more impracticable and complicated than the much simpler question in the *Cohen Grocery* case, whether a price charged was unreasonable or excessive. The real issue which the proviso would submit to the jury would be legislative, not judicial. To compel defendants to guess on the peril of an indictment whether one or more of the restrictions of the statute will destroy all profit or reduce it below what would be reasonable, would tax the human ingenuity in much the same way as that which this Court refused to allow as a proper standard of criminality in *International Harvester Company* v. *Kentucky*, 234 U. S. 216, 232, 233.

The *Cohen* case was a violation of a federal law and involved the Fifth and Sixth Amendments, the first providing that no person shall be deprived of life, liberty or property without due process

of law, and the second that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation. We are now considering a case of state legislation and threatened prosecutions in a state court where only the Fourteenth Amendment applies, but that requires that there should be due process of law and this certainly imposes upon a state an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required. And such is the effect of our cases. *Connally* v. *General Construction Company*, 269 U. S. 385; *International Harvester Company* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634; *American Seeding Machine Company* v. *Kentucky*, 236 U. S. 660; *Waters Pierce Oil Company* v. *Texas*, 212 U. S. 86; *Fox* v. *Washington*, 236 U. S. 272; *Omaechevarria* v. *Idaho*, 246 U. S. 273; *Miller* v. *Strahl*, 239 U. S. 426; *Tedrow* v. *Lewis & Son. Co.*, 255 U. S. 98; *Weeds, Inc.* v. *United States*, 255 U. S. 109, and *Kimmel* v. *Detroit Creamery Co.*, 155 U. S. 102.

In the latest of the foregoing cases, *Connally* v. *General Construction Company*, 269 U. S. 385, 391, the validity of a statute of Oklahoma providing that not more than the current rate of per diem wages in the locality where the work was performed should be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions or other persons so employed by and on behalf of the State was before us. We held that the provision contained no ascertainable standard of guilt, that it could not be determined with any degree of certainty what sum constituted a current wage in such locality because the term locality under the circumstances of that case was fatally vague and uncertain. We said (p. 391):

"The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . .

"The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some in-

stances is not easy of statement. But it will be enough for the present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them. Hygrade Provision Company v. Sherman, 266 U. S. 497, 502; Omaechevarria v. Idaho, 246 U. S. 343, 348, or a well settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ. Nash v. United States, 229 U. S. 373, 376; International Harvester Company v. Kentucky, *supra*, page 223, or, as broadly stated by Mr. Chief Justice White in United States v. L. Cohen Grocery Company, 255 U. S. 81, 92, that for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded."

The chief authority upon which counsel for the appellant rely is the case of *United States* v. *Nash*, 229 U. S. 373, 376. That case involved the question whether the Sherman Anti-Trust law in making criminal every contract and all monopolies in restraint of interstate trade or commerce fixed a permissible and ascertainable standard of guilt. It was held that it did. Because this Colorado act is an anti-trust law punishing with even more detail of description all combinations in restraint of trade in Colorado with the excepting provisos, it is supposed that the *Nash* case has direct application and supports the claim of validity for the Act. It is first to be noted that the Court in its consideration of the *Cohen* case had before it the *Nash* case, and found nothing in that case inconsistent with its *Cohen* case ruling.

In the *Nash* case we held that the common law precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute. In commenting on and affirming the *Nash* case this Court said in *International Harvester Company* v. *Kentucky*, 234 U. S. 216, 223:

"The conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy to keep to what is safe."

The common law precedents as to forbidden and permissible restraints of trade were reviewed at great length by the Circuit Court of Appeals of the Sixth Circuit in a case under the federal Anti-Trust Act in *United States* v. *Addystone Pipe Company*, 85 Fed. 271. It subsequently came to this Court, and is reported

in the 175th United States, 211. The Federal Anti-Trust Act declares every contract, combination in the form of trust or otherwise, or conspiracy in restraint of interstate trade to be illegal and every one taking part in it to be guilty of a misdemeanor. In *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 and *United States* v. *Joint Traffic Association*, 171 U. S. 505, the opinions of the Court left the impression among many that every contract in restraint of trade, no matter whether lawful and reasonable or void and unenforceable at common law was within the penalty of the statute. Such a conclusion was not necessary to the decision, and it was quite evident when the opinions were analyzed that it was recognized in their text that there were incidental restraints of trade that the statute was not intended to cover. This was made clear by the later decision in *Cincinnati Packet Company* v. *Bay*, 200 U. S. 179. The view was fully confirmed in *United States* v. *Standard Oil Company*, 221 U. S. 1, and *United States* v. *American Tobacco Company*, 221 U. S. 106, where the language of the Federal statute was read in the light of the common law, and in accordance with its reason, and was construed not to penalize such partial restraints of trade as at common law were not only permitted but were promoted in the interest of the freedom of trade itself.

The review of the many common law precedents as to due and undue restraints of trade shows that in only one or two cases, and those not well considered, was there left to the court or jury as a criterion of the validity of a restraint of trade the reasonableness of the prices fixed or the profit realized under it.

The *Addystone* case, *supra*, which involved a scheme for fixing prices, this Court quoted with approval the following passage from the lower court's opinion (85 Fed. 271, 293):

". . . the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract."

In the same case the Circuit Court of Appeals, referring to cases in restraint of trade, said (pp. 283 and 284):

"But these cases all involved contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose

of the contract, and was necessary to the protection of the covenantee in the carrying out of that main purpose. They do not manifest any general disposition on the part of the courts to be more liberal in supporting contracts having their sole object the restraint of trade than did the courts of an earlier time. It is true that there are some cases in which the courts mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt and have assumed the power to say in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint is in the public interest, and how much is not. The manifest danger in the administration of justice according to so shifting, vague and indeterminite standard would seem to be a strong reason for not adopting it."

This same view, when directed to the question of judging restraints of trade by reference to reasonableness of prices effected by the restraint is confirmed by the latest decision of this Court on the subject in *United States* v. *Trenton Potteries Company*, February 21, 1927, where is was said (page 4 of the printed opinion):

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed to-day may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."

This review showing what was the standard of criminality in the Federal Anti-Trust law, indicates clearly that the decision in the *Cohen Grocery* case was not inconsistent with the *Nash* case, because the latter did not relate to the reasonableness or excessive

ness of prices charged for necessaries without more as a basis for criminality, while the former plainly did. The same reasons show that there is nothing inconsistent between the *Cohen* case and that of *Waters-Pierce Oil Company* v. *Texas*, 212 U. S. 86.

The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation (*Small Company* v. *American Sugar Refining Company*, 267 U. S. 233, 238, *et seq.*), but the fact that it is often necessary to investigate and decide certain questions in civil cases is not controlling or persuasive as to whether persons may be held to civil or criminal liability for not deciding them rightly in advance. On questions of confiscatory rates for public utilities, for instance, courts must examine in great detail the circumstances and reach a conclusion as to a reasonable profit. But this does not justify in such a case holding the average member of society in advance to a rule of conduct measured by his judgment and action in respect to what is a reasonable price or a reasonable profit. It is true that on an issue like negligence, i. e., a rule of conduct for the average man in the avoiding injury to his neighbors, every one may be held to observe it either on the civil or criminal side of the court. It is a standard of human conduct which all are reasonably charged with knowing and which must be enforced against every one in order that society can safely exist. We said in the *Nash* case (p. 377), "But apart from the common law as to restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment as here, he may incur the penalty of death. 'An act causing death may be murder, manslaughter or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor . . . . 'The criterion in such cases is to examine whether common social duty would under the circumstances have suggested a more circumspect conduct. 1 East P. C. 262' ". Following the authority in the *Nash* case, we sustained in *Miller* v. *Oregon*, *per curiam*, January 17, 1927, 273 U. S. —, a conviction of manslaughter under a statute of Oregon, which made the following rule of conduct a standard of criminality:

"Every person operating a motor vehicle on the public highways of this State shall drive the same in a careful and prudent manner not to exceed thirty miles per hour, and within the limit of incorporated cities and towns not to exceed twenty miles per hour, and at intersections and school houses not to exceed twelve miles per hour, and in no case at a rate of speed that will endanger the property of another or the life or limb of any person." (Ch. 371, General Laws of Oregon, 1921, sec. 2, sub-division 16.)

The indictment was framed under the last clause of this statute. Such standard for the driver of an automobile on a highway is one to which it is neither harsh nor arbitrary to hold those criminally who operate such a possibly dangerous instrument of locomotion, and who are or ought to be aware of what degree of care is necessary to avoid injury to others under the conditions that prevail on a highway. See *Hess* v. *Pawloski*, decided May 16, 1927.

But it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result. When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detailed restriction of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impracticable standard for a jury's decision. A legislature must fix the standard more simply and more definitely before a person must conform or a jury can act.

We conclude that the anti-trust statute of Colorado is void in that those who are prosecuted and convicted under it will be denied due process of law.

The decree of the District Court to enjoin proceedings which the defendant threatens to bring under the Act against the plaintiffs should be affirmed, but the decree below is modified and reversed so far as it purports to enjoin the defendant from proceeding further in prosecuting the information under that Act against the plaintiffs now pending in the state criminal court.

The decree is in part reversed and in part affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.